TRANSCRIPT OF RECORD

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

NO. No.733

LEHIGH VALLEY RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION
(Intervenor),
Appellees.

Appeal from the District Court of the United States, Eastern District of Pennsylvania.

OCT 21 1916
25563

Supreme Court of the United States.

October Term, 1916.

No.

LEHIGH VALLEY RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION (Intervenor),
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA.

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DOCKET ENTRIES

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Sessions, 1915. No. 1521.

R. W. Barrett
E. H. Boles
John G. Johnson

Lehigh Valley Railroad Company

vs.

Joseph W. Folk
Charles W. Needham
Edward W. Hines,
For Interstate Commerce Commission.
Blackburn Esterline
Francis Fisher Kane,
For the United States.

United States of America.

Feby 5, 1916	Bill of Complaint filed.
	Subpoena issued returnable March 8, 1916.
	Motion for preliminary injunction filed.
	Affidavits in support of motion for preliminary injunction filed.
	Order fixing February 12, 1916, at 10 o'clock A. M., as time for hearing of motion for preliminary injunction filed.

"	12, 1916	Order for the appearance of Edward W. Hines, Esquire, for Interstate Commerce Commission filed.
		Motion to dismiss and answer of Interstate Commerce Commission filed.
		Motion of United States to dismiss petition filed.
		Argued sur motion for preliminary injunction and sur motion to dismiss petition.
		Order granting petition for preliminary injunction and fixing March 17, 1916, as date for final hearing filed.
Mch.	13, 1916	Answer filed.
"	17, 1916	Argued on final hearing.
May	12, 1916	Opinion, McPherson, J., granting decree dismissing Bill filed.
Aug.	26, 1916	Decree dismissing Bill with costs filed.
Sept.	6, 1916	Bond sur appeal by Lehigh Valley R. R. Co. in the sum of $250 filed.
		Order approving Bond sur appeal filed.
"	8, 1916	Assignments of Error filed.
		Petition for Appeal.
		Order allowing appeal filed.
"	11, 1916	Citation allowed and issued.
"	21, 1916	Citation returned service accepted.
"	23, 1916	Stipulation as to what shall constitute the transcript of record sur appeal and order of approval of same filed.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN EQUITY.

No. 1521.

LEHIGH VALLEY RAILROAD COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BILL OF COMPLAINT.
Filed February 5, 1916.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

First.—Lehigh Valley Railroad Company, a corporation organized under and by virtue of the laws of the Commonwealth of Pennsylvania and a resident of the Eastern District thereof, brings this, its bill, against the United States of America, and thereupon complains and says:

Second.—The Lehigh Valley Railroad Company owns and operates a line of railway extending *inter alia* from Jersey City and Perth Amboy, New Jersey, to Buffalo, New York, passing through the States of New Jersey, Pennsylvania and New York. The said railway has numerous branches in the States of New Jersey, Pennsylvania and New York.

Third.—Lehigh Valley Transportation Company is a corporation organized under and by virtue of the laws of the State of New Jersey having a capital stock of One Million Five Hundred Thousand Dollars ($1,500,000.00), and is duly authorized to engage in the business of transportation of property between any points and places. Lehigh Valley Railroad Company owns all of the said capital stock of Lehigh Valley Transportation Company. The principal officers of the Lehigh Valley Transportation Company are also officers of the Lehigh Valley Railroad Company. Lehigh Valley Transportation

Company is the corporate organization by which the Lehigh Valley Railroad Company owns and operates certain water lines on the Great Lakes and elsewhere in connection with and as a continuation of its railroad as aforesaid. Lehigh Valley Railroad Company is authorized by its charter under the laws of the State of Pennsylvania to own the capital stock of the Lehigh Valley Transportation Company in the manner thus outlined.

Fourth.—The Lehigh Valley Transportation Company owns and operates in connection with the Lehigh Valley Railroad Company six steel steam vessels on the Great Lakes between the Western terminus of the Railroad Company at Buffalo, New York, and Chicago, Ill., and Milwaukee, Wisconsin, on Lake Michigan, thus giving the Railroad Company a through line for the transportation of freight between the Atlantic Seaboard and points on the Great Lakes.

The following table shows the names of the said vessels, their class, tonnage (gross and net), date when built, cost thereof and value at this time:

Name of Vessel	Class	Tonnage Gross	Tonnage Net	When Built	Cost of Vessel	Present Value
Tuscarora ..	Steel	2386	1679	1890	$238,550	$128,730
Saranac	Steam	2669	1939	1890	238,145	128,730
Seneca	Vessel	2669	1939	1889	245,400	126,480
Bethlehem..	"	2633	1902	1888	257,491	118,230
Wilkes-Barre	"	4153	3311	1901	389,218	312,629
Mauch Chunk	"	4499	3609	1901	369,509	312,629
Totals					$1,738,313	$1,127,428

Fifth.—The Lehigh Valley Railroad Company began the operation of a steamboat freight service on the Great Lakes in the spring of 1881 and has continuously since that time, either itself or through its ownership of the stock of the Lehigh Valley Transportation Company, operated steamboats for freight only on the Great Lakes between its western terminus at Buffalo, New York, and points on Lake Michigan and Lake Superior. The following table shows the tonnage transported by the Lehigh Valley Transportation Company's steamboats, both east bound and west bound, between Buffalo, New York, and Chicago, Illinois, Milwaukee and Manitowoc, Wisconsin, during the calendar years indicated:

Calendar Years	Eastbound Net Tons	Westbound Net Tons
1905.....	331,773	289,752
1906.....	248,996	287,919
1907.....	302,392	313,081
1908.....	237,926	229,924
1909.....	257,554	205,397
1910.....	254,838	295,072
1911.....	303,945	259,713
1912.....	229,543	174,156
1913.....	312,480	230,214
1914.....	252,979	143,850
1915.....	278,564	191,702

Sixth.—The property investments of the Lehigh Valley Railroad Company in the six steamboats, and on account of the operation thereof by its ownership of the entire capital stock of the Lehigh Valley Transportation Company as aforesaid is very large. The six steel steamboats hereinbefore described are fitted for transporting what is known as "package freight" as distinguished from "bulk freight," and the present value thereof is $1,127,428. Lehigh Valley Transportation Company owns no terminals, but the eastern terminus thereof is known as "Tifft Farm," at Buffalo, New York, and is owned by your petitioner, the Lehigh Valley Railroad Company. This terminal is a large one and large expenditures have been made by the Railroad Company for the purpose of accommodating its boats and for insuring the prompt transfer of freight between the rail line and Lake line. Your petitioner provides two terminals for Lehigh Valley Transportation Company's boats at Chicago, Illinois, both of which are leased. For one of these terminals, located on the Chicago River at North Water Street, a rental of $16,000 per year and taxes is paid by your petitioner. This terminal was leased from the Chicago Dock and Canal Company by lease dated May 1st, 1910, expiring April 30, 1930. This lease is not terminable by either party upon notice or otherwise. A second terminal at Chicago provided by your petitioner for its Lake Line, is located on the Calumet River, South Chicago. This terminal is leased from the Elgin, Joliet and Eastern Railway Company. A rental of $1,500 per year is paid therefor on a lease dated

January 1st, 1915, for a term of one year, and terminable by either party upon thirty days' written notice. Lehigh Valley Transportation Company leases its own terminal at Milwaukee, Wisconsin. This terminal is leased from the Chicago, Milwaukee & St. Paul Railway Company on a lease dated October 1, 1908, for the term of one year at an annual rental of $4,777.70, plus taxes. The said lease is terminable upon six months' written notice by either party.

Seventh.—By the Act of Congress, approved August 24, 1912, known as the Panama Canal Act, the Fifth Section of the Act to Regulate Commerce was amended so as to make it unlawful for any railroad company or other common carrier subject to the provision of said Act to own, lease, operate, control or have any interest whatsoever, either directly or indirectly, *in any common carrier by water operated* through the Panama Canal *or elsewhere* with which said railroad or other carrier does or may compete for traffic. It was, however, provided that upon application to the Interstate Commerce Commission, common carriers owning stock in water carriers might submit the facts in reference to whether the owning rail carrier either did or might compete with the water carrier owned by it and that the Commission should after a full hearing determine the question of fact as to competition or the possibility of competition. It was also provided by the said amendment that in case application to the Commission was not filed, the Commission might institute proceedings on its own motion in order to determine whether any particular rail carrier owned or operated a water carrier with which it did or might compete for traffic. It was in all cases provided that the "order" of the Commission in respect of the competition or the possibility of competition between a rail carrier and a water carrier owned by it should be final.

Eighth.—After the passage of the law amending the Fifth Section of the Act to Regulate Commerce, as above outlined, the Commission promulgated its order under date of February 6th, 1913, whereby it prescribed a form by which it required rail carriers to report to it on or before April 15, 1913, certain facts in reference to water lines owned or operated by them or in which they were interested directly or indirectly. The said form contained twenty-four questions, covering all the matters hereinbefore recited in reference to the ownership

of the capital stock of the Lehigh Valley Transportation Company by your petitioner, and in reference to the property owned by the said Transportation Company, the traffic moved by it and all other matters in any way pertaining to it. The time for furnishing the said information was extended by the Commission, and the same was furnished by your petitioner on July 25th, 1913.

On December 2, 1913, the Commission issued a circular, addressed to all carriers, in reference to the filing of applications with it under the terms of the said amendment to Section 5 of the Act. The said circular was as follows:

"INTERSTATE COMMERCE COMMISSION.
Office of the Secretary,
Washington.

GEORGE B. MCGINTY,
Secretary.

December 2, 1913.

CIRCULAR TO ALL CARRIERS.

"The Act of August 24, 1912, known as the Panama Canal Act, prohibits, after July 1, 1914, any ownership or interest by a railroad or other common carrier in any common carrier by water when the railroad or other carrier does or may compete for traffic with such water carrier.

Jurisdiction is conferred upon the Interstate Commerce Commission to determine questions of fact as to such competition or possibility of competition. The Commission is authorized to extend the time beyond July 1, 1914, during which a railroad or other common carrier may continue the operation of service by water if such service is of advantage to the convenience and commerce of the people, and such extension will neither exclude, prevent or reduce competition on the route by water under consideration.

The Commission deems it appropriate to call attention to the provisions of this Act and to say that it will expect that every application for extension of time under the terms of the Act will be filed with the Commission not later than March 1, 1914.

By the Commission:
GEORGE B. MCGINTY,
Secretary."

Ninth.—Your petitioner, notwithstanding that it was advised by counsel that the said Section 5 of the Act as amended by the Act of August 24, 1912, was unconstitutional and void, involving an unlawful delegation of legislative power to the said Commission, in obedience to the said circular of the said Commission felt constrained, because of the penalties in said Act to Regulate Commerce against any violation of any of the provisions thereof, to file and did file with the Interstate Commerce Commission, within the time allowed by the said Act as amended and by the said circular of the Commission dated December 2, 1913, to wit: on January 21, 1914, its application for a hearing in reference to the fact of competition or the possibility of competition between itself and its water line, namely, the Lehigh Valley Transportation Company, and prayed the Commission that an order be issued to the end that the service by water of the said Lehigh Valley Transportation Company's steam vessels might continue to be operated by the petitioner, the Lehigh Valley Railroad Company, by stock ownership as aforesaid, after July 1, 1914. A copy of the said petition is attached hereto and made a part hereof and marked Exhibit "A."

Tenth.—Thereafter, on May 12th, 1914, and during several succeeding days said petition came on for a hearing before said Commission and was heard by said Commission in connection with the submission by your petitioner of the information compiled by it in reference to its said water line, as required by said Commission's order of February 6, 1913. Upon said hearing your petitioner submitted evidence in support of said application. By the evidence so submitted it was established that the Lehigh Valley Railroad Company did not and could not by any possibility compete with the water line owned and operated by it through the ownership of the entire capital stock of the Lehigh Valley Transportation Company. It was further established that the western terminus of the Lehigh Valley Railroad Company was at Buffalo, N. Y., and that the eastern terminus of the boats owned by the Lehigh Valley Transportation Company was at Buffalo, N. Y.; that the said boats operated from Buffalo, N. Y., westerly through the Great Lakes to and from Chicago, Illinois, and Milwaukee and Manitowoc, Wisconsin; and that the Lehigh Valley Railroad Com-

pany could by no possibility perform any portion of any of the transportation services that were or could be performed by the boats of the Lehigh Valley Transportation Company. By the evidence so submitted it was further established that the petitioner, the Lehigh Valley Railroad Company, derived from the traffic transported over the line of its railroad and its railroad connections to and from the boats owned by the said Lehigh Valley Transportation Company a revenue amounting to $910,687.00 during the period of navigation on the Great Lakes for the year 1913.

Thereafter and on May 7, 1915, said Commission made its report and order upon said application. Your petitioner avers that by said report the said Commission found that your petitioner did or might compete with its Lake Line, namely, the Lehigh Valley Transportation Company, the stock of which your petitioner then owned and now owns. Your petitioner further avers that its application to the said Commission was heard by the Commission as Docket No. 6504, separate and distinct from all other pending applications under said Section 5 as amended, but that the report of the said Commission and its order thereon in reference to your petitioner's application is a part of a joint report and order of said Commission covering eight other applications under said Section 5 as amended, with none of which applications your petitioner was or is in any manner connected or related, either in fact or in law. The said report appears under the title "Lehigh Valley Railroad Company (Lehigh Valley Transportation Company; Lake Line only)," at pages 699 to 716 inclusive of Volume 33 of the reports of the said Commission, to which your petitioner begs leave to refer. The order of the said Commission made in said proceeding is as follows:

"ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of May, A. D. 1915.

LAKE LINE APPLICATIONS UNDER PANAMA CANAL ACT: No. 6381.

PENNSYLVANIA RAILROAD COMPANY AND NORTHERN CENTRAL RAILWAY COMPANY (ERIE & WESTERN TRANSPORTATION COMPANY—ANCHOR LINE).

No. 6504.

LEHIGH VALLEY RAILROAD COMPANY (LEHIGH VALLEY TRANSPORTATION COMPANY; LAKE LINE ONLY).

No. 6570.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY (MUTUAL TRANSIT COMPANY).

No. 6573.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY (WESTERN TRANSIT COMPANY).

No. 6603.

RUTLAND RAILROAD COMPANY (RUTLAND TRANSIT COMPANY).

No. 6615.

ERIE RAILROAD COMPANY (ERIE RAILROAD LAKE LINE).

No. 6616.

ERIE RAILROAD COMPANY (MUTUAL TRANSIT COMPANY ONLY).

No. 6624.

GRAND TRUNK RAILWAY COMPANY OF CANADA (CANADA ATLANTIC TRANSIT COMPANY ONLY).

No. 6631.

LEHIGH VALLEY RAILROAD COMPANY (MUTUAL TRANSIT COMPANY).

No. 6765.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY (MUTUAL TRANSIT COMPANY).

It appearing, That the Pennsylvania Railroad Company, Northern Central Railway Company, Lehigh Valley Railroad Company, New York Central & Hudson River Railroad Company, Rutland Railroad Company, Erie Railroad Company, Grand Trunk Railway Company of Canada, and Delaware, Lackawanna & Western Railroad Company have separately filed applications under

Section 5 of the Act to Regulate Commerce as amended by Section 11 of the Panama Canal Act, seeking authority to continue their interest in, and to operate beyond July 1, 1914, certain boat lines operating on the Great Lakes, as described in the report of the Commission herein;

It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a report thereof:

It is ordered, That the applications of each of the petitioners in these proceedings be, and they are hereby denied, effective December 1, 1915.

By the Commission.

GEORGE B. McGINTY,
(Seal) Secretary."

Eleventh.—Your petitioner further alleges that after the issuance of the said order by the said Commission, to wit: on September 17, 1915, the Lehigh Valley Railroad Company filed its petition with the said Commission for a rehearing on its application for a continuation of its ownership of the capital stock of its Lake Line, the Lehigh Valley Transportation Company, under the said Docket No. 6504, a copy of which petition is attached hereto and made a part hereof and marked "Exhibit 'B.'" That thereafter on October 5, 1915, the Commission issued its order in reference to your petitioner's application for a rehearing, as follows:

"At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of October, A. D. 1915.

No. 6504.

In re CONTROL OF CARRIERS BY RAIL OVER CARRIERS BY WATER. APPLICATION OF LEHIGH VALLEY RAILROAD COMPANY.

Upon further consideration of the record in the above entitled proceeding, and good reason appearing therefor:

It is ordered, That this proceeding be set for further argument on October 23, 1915, at Washington, D. C., 10.30 A. M., solely upon the question whether the Commission's

order entered herein on May 7, 1915, in so far as it affects the Lehigh Valley Railroad Company, shall be modified.

By the Commission.

GEORGE B. MCGINTY,
(L. S.) Secretary."

Pursuant to the said order counsel for your petitioner appeared before the said Commission on October 23, 1915, and by oral argument and printed brief called to the attention of the said Commission the arbitrary and unlawful taking of your petitioner's property under the Commission's said order of May 7, 1915, and all other matters herein set forth were called to the attention of the said Commission. Thereafter, on December 13, 1915, the said Commission made its report and order upon the said application for a rehearing. Your petitioner avers that by the said report the Commission reaffirmed its former report and order in the said Docket No. 6504 and found that your petitioner could and did compete for traffic with the boats of the Lehigh Valley Transportation Company, its Lake Line operating as aforesaid, between its western terminus at Buffalo, New York, and points on Lake Michigan, and the said Commission dismissed your petitioner's application for a rehearing. The said report appears at pages 77 to 81, inclusive, of Volume 37 of the reports of said Commission, to which your petitioner begs leave to refer. The order of the Commission made in said application for a rehearing is in its terms as follows:

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of December, A. D. 1915.

LAKE LINE APPLICATIONS UNDER PANAMA CANAL ACT.

No. 6504.

LEHIGH VALLEY RAILROAD COMPANY (LEHIGH VALLEY TRANSPORTATION COMPANY; LAKE LINE ONLY).

This proceeding coming on for further consideration upon the petition for rehearing filed by the Lehigh Valley Railroad Company, and the Commission having, on the date hereof, made and filed its report upon the matters and things involved in said petition for rehearing, which report is hereby referred to and made a part hereof:

It is ordered, That said petition for rehearing be, and it is hereby, dismissed.

By the Commission.

GEORGE B. MCGINTY,
Secretary."

(Seal)

The petitioner further avers that the effective date of the order of the Commission of May 7, 1915, as affirmed, was postponed by a subsequent order of the Commission from December 1, 1915, to December 15, 1915, the purpose of the said postponement being not to interfere with the operation of the railroad-owned boats on the Great Lakes during the period of navigation for 1915.

Twelfth.—Your petitioner alleges that the Fifth Section of said Act to Regulate Commerce as amended by said Act of August 24, 1912, is unconstitutional and void, in that by said section as amended, Congress has assumed to delegate important legislative power to said Commission; that by said section as so amended said Commission is empowered arbitrarily to grant or withhold leave to the petitioner to continue to operate a large portion of its property lawfully purchased by it and long used by it in the interstate transportation of freight on the Great Lakes in connection with its transportation of freight by its rail lines as aforesaid; that no standard is supplied by said section or by any of the provisions of said Act to Regulate Commerce for the guidance or control of said Commission in passing upon applications made thereunder to have the question of competition or the possibility of competition between the petitioner's rail line and water line determined; that the said orders of the Commission made in said proceeding and which by their terms profess to be made, and in fact were made, by said Commission under the supposed authority conferred upon it by said amended Fifth Section, are unlawful and void.

Thirteenth.—Your petitioner further alleges that assuming said Section 5 of said Act to Regulate Commerce as amended by said Act of August 24, 1912, to be a constitutional enactment, the Commission erred in making its said orders of May 7, 1915, and of December 15, 1915, in said Docket No. 6504, in that it arbitrarily and without evidence upon which

to base its said orders deprived the petitioner of the use of property valued at more than one million dollars ($1,000,000); and further that the said Commission unlawfully and without basis either in fact or in law held in its said opinion, upon which its said orders were based, that your petitioner did and could compete with the line of steamboats operating on the Great Lakes and owned as aforesaid by the Lehigh Valley Transportation Company; that the said orders were arbitrarily and unlawfully made by the said Commission, although it was demonstrated to the said Commission that your petitioner's railroad could not by any possibility transport any freight of any kind over any of the distance or to or from any place where the boats of the said Lehigh Valley Transportation Company did or could operate; that the said orders were arbitrarily and unlawfully made by the said Commission, although it was demonstrated to the said Commission that your petitioner did not own, control or operate or have any interest, either direct or indirect, in any carrier by rail that did or could transport any freight that could by any possibility be or have been transported by the boats of the said Lehigh Valley Transportation Company.

Fourteenth.—Your petitioner avers that the said Commission by the said order of May 7, 1915, and its refusal to reopen and reconsider your petitioner's application, contained in its said order of December 13, 1915, arbitrarily and unlawfully deprives your petitioner of many thousands of dollars worth of property now used by your petitioner in carrying on its lawful function of interstate transportation; that if said order remains in effect your petitioner will be unable, through its ownership of the capital stock of the Lehigh Valley Transportation Company to use in interstate transportation the six steel steam vessels or any of them as hereinbefore described; that your petitioner will be unable to make profitable use of its large lake terminal at the City of Chicago, located on the Chicago River at North Water Street, during the entire period of the lease for the same, viz., until April 30, 1930, and that your petitioner will be compelled to pay the annual rental thereon, amounting to sixteen thousand dollars ($16,000) per year during the same period. That your petitioner will be unable to make use of the facilities provided at its Buffalo Lake Terminal at great expense for the purpose of accommodating

the steam vessels of the Lehigh Valley Transportation Company and interchanging freight between its rail line and lake line.

Fifteenth.—Your petitioner further alleges that, in order that its right to continue its lawful ownership of the capital stock of the Lehigh Valley Transportation Company might be quickly and satisfactorily adjusted in a court of law, it wrote the Department of Justice on September 14, 1915, stating that it was about to file its petition with the Interstate Commerce Commission for a rehearing and that if the Commission refused to grant a rehearing your petitioner desired to take its case into the courts, so that the matter might be speedily determined, your petitioner, therefore, asked the Department of Justice whether, if your petitioner operated a boat on the Great Lakes after the expiration of the time set in the Commission's order of May 7, 1915, the Attorney General would enter suit against your petitioner for the penalty prescribed by the Act. A copy of the letter written by your petitioner through its General Solicitor to the Department of Justice is attached hereto and made a part hereof and marked "Exhibit 'C.'" The Department of Justice, by its Special Assistant to the Attorney General, acknowledged the receipt of the said letter from your petitioner under date of September 18, 1915. A copy of the said acknowledgment is attached hereto and made a part hereof and marked "Exhibit 'D.'" Pursuant, therefore, to the information given the Department of Justice in your petitioner's letter hereinbefore referred to, your petitioner operated on December 16, 1915, its steamer "Wilkes-Barre" on the Great Lakes for the purpose of enabling the Attorney General to enter suit against your petitioner for the penalty prescribed by the Act and thus quickly adjust your petitioner's status in the courts. Immediately after the operation of the said steamboat on the Great Lakes for the purpose of testing the Act as aforesaid, to wit, on December 20, 1915, your petitioner informed the Department of Justice of its action and asked that the Attorney General enter suit for the penalty involved. A copy of the letter written by the petitioner's General Solicitor to the Special Assistant to the Attorney General in this respect is attached hereto and made a part hereof and marked "Exhibit 'E'". The Department of Justice, through its

Special Assistant to the Attorney General, replied to the petitioner's letter of December 20th, under date of December 21, 1915, and promised the petitioner that the matter would be given careful consideration by the Attorney General and that the petitioner would be promptly advised. A copy of the said letter is attached hereto and made a part hereof and marked "Exhibit 'F' ".

Your petitioner received no advice from the Attorney General in reference to this matter until January 19, 1916, when your petitioner's General Solicitor received an additional letter from the Department of Justice under date of January 18, 1916, stating that owing to the pressure of other business and the absence of an Assistant from the office of the Attorney General, no consideration had been given to the subject matter of your petitioner's request. A copy of this letter is attached hereto and made a part hereof and marked "Exhibit 'G' ".

On January 19, 1916, your petitioner wrote the Special Assistant to the Attorney General, in reply to his letter of the 18th, referred to above, as follows:

LEGAL DEPARTMENT
"LEHIGH VALLEY RAILROAD COMPANY
143 Liberty Street
New York.

JOHN G. JOHNSON
General Counsel
E. H. BOLES,
General Solicitor
R. W. BARRETT
Asst. General Solicitor
B. F. LARUE
Asst. General Solicitor

JANUARY 19, 1916.
15277E

In re LEHIGH VALLEY LAKE LINE APPLICATION UNDER THE PANAMA CANAL ACT.

BLACKBURNE ESTERLINE, ESQ.,
Special Assistant to the Atty. General,
Washington, D. C.

DEAR SIR:

I have your letter of January 18th, about the Lehigh

Valley lake line case. I am sorry that the Department has not yet done anything toward taking action in our matter, because I wanted to get the law tested out as soon as possible. It seems to me it is a matter of public interest that we should have the courts construe the Act at once, because it will be a great hardship to us and a considerable hardship to shippers as well if we must lay up our boats next summer.

We have had no conference with representatives of the Interstate Commerce Commission on the matter since the Commission passed unfavorably upon the points raised in our reargument of the case—that is, that in view of the lack of competition under our theories between the two companies, the Commission really did not have jurisdiction at all.

Yours very truly,
E. H. BOLES,
General Solicitor."

On January 24, 1916, your petitioner's General Solicitor received the following letter from the Special Assistant to the Attorney General:

"DEPARTMENT OF JUSTICE,
WASHINGTON, D. C.,
JANUARY 24, 1915.

EDGAR H. BOLES, ESQ.,
General Solicitor, L. V. R. R. Co.,
143 Liberty St., New York, N. Y.

DEAR SIR:

Referring to your favor of the 19th instant, *in re* Lehigh Valley lake line application under the Panama Canal Act, will advise that the matter is now receiving consideration at the Department. Tomorrow I must leave for the far West to be gone for ten days or two weeks. Soon after my return we shall have some report to make to you on the subject matter of your two recent letters.

Very respectfully yours,
(Signed) BLACKBURN ESTERLINE,
Special Assistant to the Attorney General."

Your petitioner has, therefore, made every effort to secure through the Department of Justice a quick and adequate interpretation of the law in respect of its status as a competitor of its boat line, Lehigh Valley Transportation Company, the capital stock of which is owned by the petitioner, but has failed to secure any action therefrom. There has been no delay on the part of the petitioner in its continued efforts to secure an adjudication of its right under the law to continue in its ownership of the capital stock of the Lehigh Valley Transportation Company, operating steamboats on the Great Lakes. Your petitioner further avers that even if the Attorney General should now, after such a considerable period of delay, enter a suit at law against your petitioner, the issues involved therein, the settlement of which would permit your petitioner to continue in the ownership of the capital stock of the Lehigh Valley Transportation Company, cannot possibly be adjudicated before the opening of lake navigation for the season of 1916, which will occur on or about April 15, 1916.

Sixteenth.—Your petitioner further alleges that the season of navigation on the Great Lakes will open on or about April 15, 1916, and that your petitioner has in effect over its rail line and the boats of the Lehigh Valley Transportation Company, between the Atlantic seaboard and Chicago, Illinois, Milwaukee, Wisconsin, and a large number of other points in the West and Northwest, through routes and joint rates on a large number of commodities; that the joint rates over the petitioner's rail line and by the boats of the Lehigh Valley Transportation Company between New York and Chicago are lower than the all-rail rates between the said points. The differential between the said all-rail rates and the lake-and-rail rates via your petitioner's rail line and boat line on the six classes of freight, together with present all-rail rates, and lake-and-rail rates, shown in cents per hundred pounds, between New York and Chicago, are as follows:

Classes	All-Rail Rates	Lake-and-Rail Rates	Differentials
First	78.8	62.0	16.8
Second	68.3	54.0	14.3
Third	52.5	41.0	11.5
Fourth	36.8	30.0	6.8
Fifth	31.5	25.0	6.5
Sixth	26.3	21.0	5.3

Your petitioner avers that the said differentials between the all-rail rates and the lake-and-rail rates are so great that a large number of shippers, both along your petitioner's rail lines and at the western termini of the Lehigh Valley Transportation Company's boat line and at many points in the West and Northwest, and in New England, have shipped by and will continue to ship by, if your petitioner is enabled to offer lake-and-rail service as heretofore, your petitioner's rail lines in connection with its said boat line. Your petitioner further avers on information and belief that it is the custom of and is necessary for shippers to know many weeks before the opening of navigation on the Great Lakes whether your petitioner will offer rail-and-lake service at the rates and under the conditions heretofore offered and hereinbefore described; that contracts for the sale of merchandise which will or may move by your petitioner's boat line and rail lines must be made by shippers many months before the opening of lake navigation; that it is necessary, therefore, for your petitioner to inform shippers, both on its rail lines and at points in the West and Northwest adjacent to or convenient to its boat line, at the earliest possible date whether your petitioner will operate its said boat line at the opening of navigation on or about April 15, 1916; that your petitioner desires to operate its said boat line by the ownership of the capital stock of the Lehigh Valley Transportation Company during the period of navigation on the Great Lakes in 1916 and thereafter, as heretofore, and that it has so informed a large number of its shippers located as aforesaid; that your petitioner has also informed the said shippers that by the unlawful order of the Interstate Commerce Commission, hereinbefore set forth, and on account of the excessive penalties prescribed by the Interstate Commerce Act for the violation of any of the orders of the Commission made in pursuance of the said act, your petitioner will not be able to operate its said boats and furnish its shippers with the said through routes and joint rates hereinbefore referred to, unless your Honorable Court will enjoin the defendant and the Interstate Commerce Commission and its members, their agents, servants and representatives, from enforcing the said order of May 7, 1915, and from taking any steps or instituting any proceedings for the enforcement thereof; that if your Honorable Court does so enjoin the defendant, the Interstate Com-

merce Commission and its members, their agents, servants and representatives, your petitioner will continue to operate its said boats and to furnish its said shippers with through routes and joint rates as hereinbefore described. Your petitioner further alleges that the said order of the Commission, if it is allowed to remain in full force and effect, will cause your petitioner irreparable damage.

Seventeenth.—Wherefore your petitioner prays that due service of this petition be made on the respondent herein, and that it please Your Honors to grant unto your petitioner a writ of *subpoena ad respondendum* issuing out of and under the seal of this Honorable Court directed to the said respondent, the United States of America, commanding it to appear and make answer to this Bill of Complaint (but not under oath, answer under oath being expressly waived) and to perform and abide by such orders and decrees herein as to this Court may seem required by the principles of justice and equity; that due and proper notice of this Bill for an Injunction be duly served on the respondent, on the Attorney General of the United States and on the Interstate Commerce Commission, and that the respondent and the Interstate Commerce Commission and its members, their agents, servants and representatives and each of them be perpetually enjoined and restrained by a decree and injunction of this Court from enforcing the said order of the Interstate Commerce Commission of May 7, 1915, and from taking any steps or instituting any proceedings for the enforcement thereof, and your petitioner also prays that a provisional or preliminary injunction be issued out of and under the seal of this Honorable Court, enjoining and restraining the respondent and the Interstate Commerce Commission and its members, their agents, servants and representatives and each of them, to the same purpose, tenor and effect hereinbefore prayed in regard to said perpetual injunction, and for such other and further relief, general and special, in the premises as justice and equity may require.

LEHIGH VALLEY RAILROAD COMPANY,
By R. W. BARRETT,
Its Solicitor.

E. H. BOLES,
JOHN G. JOHNSON,
Of Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*:

LYMAN D. SMITH, being duly sworn according to law, deposes and says that he is the Vice-President of the Lehigh Valley Railroad Company, the above named complainant, and makes this affidavit on behalf of said Railroad Company; that he has read the foregoing bill and knows the contents thereof and that the same is true of his own knowledge, except as to matters and things therein stated to be upon information and belief, and as to those matters and things he believes them to be true.

LYMAN D. SMITH.

Sworn to and subscribed before me this 4th day of February, A. D. 1916.

WILLIAM F. GLEESON,
Notary Public, Kings Co. No. 72,
Certificate filed in N. Y. Co. No. 92.
New York Register No. 6187.
(Notarial Seal)

EXHIBIT "A".

BEFORE THE
INTERSTATE COMMERCE COMMISSION.
Dkt. 6504.

IN RE CONTROL
OF
CARRIERS BY RAIL OVER CARRIERS BY WATER.

APPLICATION OF LEHIGH VALLEY RAILROAD COMPANY.

R. W. BARRETT,
E. H. BOLES,
Attorneys for Lehigh Valley Railroad Company.

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

In re CONTROL OF CARRIERS
BY RAIL OVER CARRIERS BY
WATER.

APPLICATION OF LEHIGH VALLEY RAILROAD COMPANY.

Pursuant to the provisions of Section 5 of the Act to Regulate Commerce, as amended by Section 11 of the Act of Congress of August 24, 1912, entitled "An Act to Provide for the Opening, Maintenance, Protection and Operation of the Panama Canal and the Sanitation and Government of the Canal Zone", the Lehigh Valley Railroad Company hereby petitions the Interstate Commerce Commission, and in support of such petition avers:

1. That your petitioner is a railroad company engaged in Interstate Commerce, and subject to the provisions of the Act to Regulate Commerce, its supplements and amendments (in so far as the said act and its supplements and amendments are constitutional and enforceable), and is duly chartered and organized under and by virtue of the laws of the State of Pennsylvania.

2. That the Lehigh Valley Transportation Company is a

corporation chartered under the provisions of the laws of the State of New Jersey, and duly authorized to engage in the business of the transportation of property between any points and places and has a capital stock, amounting to $1,500,000.00.

3. Pursuant to the said corporate authority the Lehigh Valley Transportation Company owns and operates in connection with and under the supervision of the petitioner, certain steam vessels, ferry boats, car-floats, lighters and barges (all of which appears in detail in the report of the petitioner filed with the Interstate Commerce Commission, pursuant to its order in respect thereto, made on February 1, 1913, and whereof due proof will be made at the hearing on this petition), transporting freight by water as follows:

a. Steam vessels operating on the Great Lakes, between Buffalo, New York, Manitowoc and Milwaukee, Wisconsin, and Chicago, Illinois.

b. Tugs and barges on the sea-coast between Perth Amboy, New Jersey, and points on Long Island Sound and the New England coast.

c. Towing service between Perth Amboy, New Jersey, and various piers and docks in New York Harbor and at intermediate points.

d. Lighterage and car-float service in New York Harbor, between various piers and docks in New York and Brooklyn, and points in Jersey City immediately adjacent thereto.

4. That the Morris Canal and Banking Company is a corporation chartered under the provisions of the laws of the State of New Jersey, duly authorized, *inter alia,* to engage in transportation of property between Phillipsburg, New Jersey, and Jersey City, New Jersey, with a capital stock amounting to two million two hundred thousand dollars.

5. That the Morris Canal and Banking Company is the owner of certain barges and canal-boats used for the purpose of carrying freight, all of which appears in detail in the report of the petitioner, filed with the Interstate Commerce Commission, pursuant to its order in respect thereto, made on February 6, 1913, and whereof due proof will be made at the hearing on this petition.

6. That the said Lehigh Valley Transportation Company is a party to through routes and joint rates with various carriers, as will appear from the tariffs on file with the Interstate Commerce Commission and posted and published according to law.

7. That your petitioner, the Lehigh Valley Railroad Company, is the owner of the entire capital stock of the said Lehigh Valley Transportation Company and of 97 per cent. of the capital stock of the Morris Canal and Banking Company; that the stock of the Lehigh Valley Transportation Company was acquired at par between July, 1901, and June, 1906; that the stock of the said Morris Canal and Banking Company was acquired at a price on the average above par between January, 1871, and February, 1912.

8. That your petitioner in addition to the ownership of 97 per cent. of the capital stock of the said Morris Canal and Banking Company, as hereinbefore set forth, operates the said canal between Phillipsburg, New Jersey, and Jersey City, New Jersey, as lessee thereof.

9. That your petitioner, the Lehigh Valley Railroad Company, operates a line of railroad, *inter alia*, between Buffalo, New York, on Lake Erie, and North Fair Haven, New York, on Lake Ontario, and Jersey City and Perth Amboy, New Jersey, and is a party with the Lehigh Valley Transportation Company, the lake line hereinbefore fully described, to through routes and joint rates to and from various points, none of which are reached by the lines of railroad owned or operated by the Lehigh Valley Railroad Company.

10. Your petitioner, the Lehigh Valley Railroad Company, avers that the existing services by water of all the said steam vessels, steam tugs, car floats, lighters, barges, canalboats and other vessels, referred to in the foregoing paragraphs of this petition, are being operated in the interest of the public, and that the said services are of advantage to the convenience and commerce of the people, and that an extension of the time during which such services by water may continue to be operated by your petitioner beyond July 1, 1914, will neither exclude, prevent, nor reduce competition on the water routes traversed by the said steam vessels, steam tugs, car floats, lighters, barges, canal boats and other vessels hereinbefore set forth.

WHEREFORE, your petitioner prays that a full hearing may be had in the premises, as provided by Section 11 of the Act of Congress of August 24, 1912, as to whether the existing services of the said steam vessels, steam tugs, car floats, lighters, barges, canal boats and other vessels hereinabove referred to, would be, from and after July 1, 1914, in violation of the said section, and that such order may be made as the Commission may deem appropriate to the end that the said service by water of the said steam vessels, steam tugs, car floats, lighters, barges, canal boats and other vessels may continue to be operated by your petitioner beyond July 1, 1914, and that the Commission shall grant such other and further relief as the Commission may deem appropriate.

LEHIGH VALLEY RAILROAD COMPANY,
By E. B. THOMAS,
President.

R. W. BARRETT,
E. H. BOLES,
Attorneys for Lehigh Valley Railroad Company.

EXHIBIT "B".

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

Docket No. 6504.

Application of LEHIGH VALLEY RAILROAD COMPANY (LEHIGH VALLEY TRANSPORTATION COMPANY LAKE LINE ONLY) under the provisions of Section 5 of the Interstate Commerce Act as amended by Section 11 of the Act of Congress of August 24, 1912.

PETITION FOR REHEARING.

E. H. BOLES,
R. W. BARRETT,
Attorneys for Petitioner.

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

Application of LEHIGH VALLEY RAILROAD COMPANY (Lehigh Valley Transportation Company lake line only) under the provisions of Section 5 of the Interstate Commerce Act as amended by Section 11 of the Act of Congress of August 24, 1912.

Docket No. 6504.

PETITION OF LEHIGH VALLEY RAILROAD COMPANY FOR A REHEARING ON ITS APPLICATION FOR A CONTINUATION OF ITS LAKE SERVICE (LEHIGH VALLEY TRANSPORTATION COMPANY) FROM AND AFTER JULY 1, 1914.

The Lehigh Valley Railroad Company, as the owner of the entire capital stock of the Lehigh Valley Transportation Company, operating six steam vessels on the Great Lakes between Buffalo, N. Y., Manitowoc and Milwaukee, Wis., and Chicago, Ill., hereby petitions the Interstate Commerce Commission to reopen the proceedings and reconsider the petitioner's application to continue its lake service between the points mentioned above after July 1, 1914. In support of this petition for a rehearing the applicant offers the following reasons:

I. That your petitioner, the Lehigh Valley Railroad Company, operates a railroad between Jersey City, N. J., also having terminals at various points in Greater New York, on the East, and Buffalo, N. Y., and North Fair Haven, N. Y., on the North and West; that connecting with the Western terminus of its rail line at Buffalo, N. Y., the applicant, by the ownership of the entire capital stock of the Lehigh Valley Transportation Company, operates a line of steamers to and from Chicago, Ill., and Manitowoc and Milwaukee, Wis. Your petitioner does not own, operate or have any interest whatsoever, either by lease, stock ownership or in any other manner in any rail line west of its terminus at Buffalo, N. Y.

Your petitioner has no means under its control, either directly or indirectly, of transporting freight from its said western terminus to Chicago, Milwaukee and Manitowoc by any other manner than its said steamers owned and operated by the Lehigh Valley Transportation Company.

The petitioning Railroad, therefore, does not parallel either directly or indirectly with its rails any portion of the route over which the boats of the Lehigh Valley Transportation Company either do at the present time or can by any possibility transport any freight or passengers. The said boat line is an extension of the petitioner's rail line and makes the petitioner thereby a greater competitor of other rail lines than it would otherwise be if confined only to its rail line terminating at Buffalo, N. Y.

In pursuance of the application heretofore made by your petitioner in this matter, the Commission, under date of May 7, 1915, issued its report and order permitting the present status of relationship between the Lehigh Valley Railroad and the Lehigh Valley Transportation Company to continue until December 1, 1915. An examination of the Commission's report in said case shows that apparently the only reason why the Commission refused to permit the said relationship to continue for a longer time was the Commissioner's belief that the said two companies were engaged in competition within the meaning of the Panama Canal Act. At page 706 of said report the Commission says:

> "The effect of such alliances on their boat lines indicates that these railroads are parties to arrangements which make them competitors of their boat lines."

The words "these railroads" refer to the Delaware, Lackawanna & Western Railroad Company and the Lehigh Valley Railroad Company mentioned in the early part of the same paragraph. What are the alliances referred to?

(*a*) The Commission first refers to concurrences in through passenger fares. The Lehigh Valley transportation Company does not operate any passenger boats and has no boats equipped for passenger service, and has never carried passengers for hire on the Great Lakes.

(*b*) Through routes and joint rates: Concurrences in joint rates are necessary as a matter of law. The reason for

them is the convenience of shippers. Through transportation as such can just as readily take place on a combination of local rates and constantly and universally does.

Moreover, the Commission, under the Interstate Commerce Act, has the authority to order, under certain circumstances, joint rates to be put into effect. If, therefore, joint rates may be considered a test of the existence of competition, then the Commission could, by ordering that which did not exist, force the Lehigh Valley Railroad into what the Commission apparently considers a status of competition with its own boat lines, and then in turn order its divorcement from the latter. It is not to be contemplated that Congress intended that the Commission might thus bring about, by indirection, what it is not directly empowered to do by the Panama Canal Act itself.

So far as the Lehigh Valley Railroad is concerned, which alone is the owner of the Lehigh Valley Transportation Company, it is not in competition with respect of the movement of any freight west of Buffalo. Irrespective of whatever route the traffic actually takes, the Lehigh Valley Railroad receives the full length of all the haul it can possibly receive, that is, between Buffalo and New York. In speaking of this all-rail traffic, the Commission refers on page 707 to the incentive existing in respect of the interchange of all-rail business. This is not a factor in respect of either a fair or a legal test of competition. Competition is, in respect and only in respect, of a service to a shipper. If a shipper has an election between an all-rail route and a lake-and-rail route, he has that status of competition existing which the law is intended to provide. If he does not choose, either with or without solicitation, to elect between routes and himself to direct the routing of the freight, then the law as to competition should no longer be considered to apply, as it cannot in theory apply, and the originating carrier should be free, within the requirements of the Commission as to observing the shipper's best interests as to rates, to give the shipment to one or another of its connections as it sees best. The shipper is in no sense injured by that situation. That competition which is contemplated by the Panama Canal Act neither in law nor reason applies to the interchange of unrouted freight between connecting carriers.

The Act strikes at competition between a rail line and a boat line under the same ownership or control, and not at

competition between a boat line and a rail line over which the owner of the boat line has no control, either direct or indirect. The Act uses the words "own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly or indirectly, through any holding company or by stockholders or directors in common, or in any other manner.") The Lehigh Valley Railroad has none of the interest referred to in the Act in any rail line west of Buffalo. The Act does not prohibit the Lehigh Valley Railroad from owning a boat line if such boat line competes with the New York, Chicago and St. Louis Railroad, or the Wabash Railroad, or the Pennsylvania Railroad. It only prohibits such ownership when the lake line competes with its owner or with the corporation in control of it.

(*c*) Fast freight or despatch lines: These are no more than trade names. They are simply a method of advertising and a convenience in solicitation. Reduced to their essentials every point mentioned by the Commission in respect of competition as related to these advertised routes comes down to the existence of joint rates and through routes. They merely designate a particular route, and are an indication of through special service rendered thereover by the connecting carriers participating therein. No carrier in the route is responsible for or has any voice in the transportation of the property on the rails of the connecting carriers—as carriers, each railroad renders its service as separately and distinctly as if the goods moved on a combination of local rates. As related to competition, these specially designated avenues of commerce involve no more nor no less than are involved in the existence of joint rates and through routes.

The fast freight line to the expenses of which the Lehigh Valley Railroad contributes does not make the railroad a competitor of its boat line. This line is the Traders Despatch, operating over the New York, Chicago and St. Louis Railroad, otherwise known as the Nickel Plate Road, and the Lehigh Valley Railroad, between Chicago and New York. The Traders Despatch solicitor seeks to secure freight for two railroads, the Nickel Plate and the Lehigh Valley. He is working for the Nickel Plate Railroad in his efforts to compete with the Lehigh Valley Transportation Company, but he also solicits for the Lehigh Valley Railroad. However, in this he is competing not with the Lehigh Valley boat line, but with the

rail carriers paralleling the Lehigh Valley Railroad from Buffalo to New York City. In this capacity he is a competitor of other railroads connecting with the Nickel Plate at the City of Buffalo and reaching New York City, and not a competitor of the Lehigh Valley boat line reaching points to which the Lehigh Valley Railroad does not extend.

So far as the compensation paid by the Lehigh Valley Railroad in respect of solicitation is concerned, it relates solely to the status of the Lehigh Valley Railroad among its competitors in the rail haul between Buffalo and eastern points. As to the compensation paid by the Nickel Plate, that is a solicitation against the competition of the rail routes west of Buffalo and the lake routes west of Buffalo, which competition is not only not prohibited by the Act, but is encouraged thereby. The only competition, therefore, which arises out of the existence of the through routes, the joint rates, the despatch lines and the fast freight lines in so far as the Lehigh Valley interests are concerned, is, on the one hand, that which exists east of Buffalo between the railroad and its railroad competitors and, on the other hand, that which exists between the lake line and its competitors all of which are engaged in transportation west of Buffalo. There is a competitive group east of Buffalo and a competitive group west of Buffalo. The Lehigh Valley Railroad falls in the first group and the Lehigh Valley Transportation Company falls in the second group. The Lehigh Valley Railroad and its supplement, the Lehigh Valley Transportation Company, taken together, compete with both groups but not with each other.

II. "Competition" was thus defined by the Supreme Court of the United States (see Union Pacific Case, 226 U. S. at p. 87):

> "To compete is to strive for something which another is actively seeking and wishes to gain * * *
>
> "Competition between two such systems consists not only in making rates * * * but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies."

If the Lehigh Valley Railroad is, under the definition of "competition" outlined by the Supreme Court, competing with its lake line, the following situations must exist:

1. The Lehigh Valley Railroad must be striving for something which the Lehigh Valley boat line is actively seeking and wishes to gain. There cannot be a pound of freight which the Lehigh Valley Railroad can seek for itself and which by such seeking it can take from the Lehigh Valley boat line. The two lines must be complementary in order that the one be able to seek and take from the other that which the other desires. The Lehigh Valley boat line and rail line connect, and one can not carry anything to the exclusion of the other, but may carry freight in connection with the other.

2. Rate-making:

As the two lines are supplemental and the one can not carry anything to the exclusion of the other, there can be no competition between them in rate-making.

3. Character of service rendered:

As the Lehigh Valley lake line and rail line seek to carry the same freight only in connection with each other, there can be no competition between the two in the matter of service. There may be competition and must be between the lake line and the other railroads paralleling it, *i. e.*, other railroads which could either in whole or in part perform the same service it performs if the opportunity were offered.

4. Competition in the accommodation of the shipper in handling and caring for freight and in the prompt recognition and adjustment of the shippers' claims.

Here again the subject matter of the competition itself makes competition between the Lehigh Valley boat line and lake line impossible. The rail line cannot compete with the boat line in furnishing accommodations to shippers when the two do not reach the same points, but are only supplements, the one to the other. The rail line and the boat line cannot compete with each other in the adjustment of shippers' claims when the shippers' claims have no reference to the transportation between the same points on the lake line and the rail line.

By this final test of competition laid down by the Supreme Court of the United States, it is a practical and

physical impossibility for two supplemental lines, a rail line and a boat line connecting at one point, neither having the possibility of performing the service performed by the other, to be in competition with each other.

III. The granting of the application of the petitioner to continue the operation of its boats on the Great Lakes between the cities referred to will have no bearing upon the efficacy of the prohibitions contained in Section II, paragraph 1 of the Panama Canal Act in their application to the operation of the railroad-owned boats through the Panama Canal, the said section being as follows:

> "From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to Regulate Commerce to own, lease, operate, control or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

for the following reasons:

In the transportation of freight over its rail line and its boat line the petitioner, the Lehigh Valley Railroad Company, cannot by any possibility transport the said freight either the whole or any part of the distance covered by its boat line over the rails of its rail line. Such is not the case with transcontinental railroads which might apply for the privilege of transporting freight by steamship through the Panama Canal.

If such freight were to originate on the Pacific Coast at the western terminus of any of our present transcontinental railroads and be transported through the Panama Canal by a steamship owned by any of these railroads, the same freight could instead of having taken the boat line have taken

the rail line of the owner of the steamship to its eastern terminus, *e. g.,* New Orleans, Chicago or Duluth, and thence rail connections to its eastern destination. In this instance, the rail-line-owner of the steamship might be said to compete with its boat line for at least part of the transportation between the point of origin and final destination.

The same is true of freight originating on the eastern coast of the United States. If an eastern Railroad Company transported freight through the Panama Canal by one of its own boats to a western destination it might be said to compete with its rail line for that portion of the journey measured by the distance between the eastern and western termini of its rail line. The freight is to move between two certain points, say New York and San Francisco; it can go all-rail or by boat. For a part of the journey at least, any rail line running out of New York toward the west can carry theoretically in competition with the boat and may be said to be its competitor—as to that journey there is competition *pro tanto.* Such a condition cannot exist between the Lehigh Valley Railroad Company's rail line and boat line. *Its rail line can by no possibility transport freight for any portion of the distance over which its boat line might also transport the same freight.* The Lehigh Valley's boat line is a *supplement* to its rail line and not a complement thereof. The Panama Canal Act was intended to meet and does meet conditions only where the boat line is the *complement,* but not the supplement, of the lines of its rail owner. The granting, therefore, of the Lehigh Valley Railroad Company's application on the ground that its rail line cannot by any possibility compete with its supplemental boat line will militate in no manner against the efficacy of all the prohibitions contained in the first paragraph of Section 11 of the Panama Canal Act.

It is, therefore, respectfully submitted that proceedings on the petitioner's application should be reopened and the petitioner's case reconsidered in the light of the foregoing statements.

Respectfully submitted,
E. H. Boles,
General Solicitor,
143 Liberty Street,
New York City, N. Y.

R. W. Barrett,
Of Counsel.

EXHIBIT "C".

LEHIGH VALLEY RAILROAD COMPANY
LEGAL DEPARTMENT.
143 Liberty Street
NEW YORK

SEPTEMBER 14, 1915.
15277.

JOHN G. JOHNSON
General Counsel
E. H. BOLES
General Solicitor
R. W. BARRETT
Asst. General Solicitor
B. F. LARUE
Asst. General Solicitor
BLACKBURN ESTERLINE, ESQ.,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

DEAR SIR:—

I am going to file a petition for a rehearing before the Interstate Commerce Commission in our Lehigh Valley lake line application. I will send you a copy as soon as the petition is printed.

If the Commission won't give us, that is, the Lehigh Valley, any further relief or extension of time under the Act, then I will take the case into the courts, but as I mentioned to you the other day, I cannot see how to get it into the courts until after the permissive order of the Commission expires, which as now fixed is December 1st. If we run a boat after that time, say on one journey from Buffalo to Chicago, will you sue us for a penalty for the purpose of having a test case brought?

The status of the Lehigh Valley Railroad and the Lehigh Valley Transportation Company, under the Panama Canal Act, as I think you will admit after reading this rehearing petition, is certainly not free from considerable doubt, and it seems to me, therefore, only fair that the Government should co-operate in resolving this doubt in order that we may continue to exercise our lawful rights, if such the Court

finds them to be, in owning the stock of the Lehigh Valley Transportation Company. Even if a test case is brought early in December, it would seem to be impossible to have any decision in time for the opening of navigation next year, but we might trustee the stock perhaps, under an order of the Commission, so that operation could continue next season. It would appear to be in the public interest that the boats should continue to run.

Will you kindly consider the matter, and I will talk it over again with you in Washington soon.

Yours very truly,

(Signed) E. H. BOLES,

BD *General Solicitor.*

EXHIBIT "D".

DEPARTMENT OF JUSTICE,
WASHINGTON.

SEPTEMBER 18, 1915.

E. H. BOLES, Esq., General Solicitor,
Lehigh Valley Railroad Company,
143 Liberty Street,
New York, New York.

DEAR SIR:—

Your favors of the 14th and 15th instant (the latter enclosing copy of petition for rehearing), in the Lehigh Valley Lake Line Case, were received during my absence in Pittsburgh, and I have just returned.

Frankly, I know little or nothing about the so-called Lake Line Case beyond the fact that there is such a case. However, in view of its importance and what may occur hereafter, I shall take up a study of it. I would be obliged if you would send me any brief or briefs filed by you before the Interstate Commerce Commission, and any other literature which you may have on the subject. Of course, I should not undertake to sit in any conferences, make any stipulation, or even give any suggestions, without a full knowledge of the case in all of its various aspects.

I shall be glad to see you the next time you are in Washington. On Friday, 24th instant, I expect to leave for Chi-

cago and to argue a case at Danville, Illinois, on the 28th instant. Altogether, I shall expect to be gone about a week.

Very respectfully yours,
(Signed) BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

EXHIBIT "E".

LEHIGH VALLEY RAILROAD COMPANY
LEGAL DEPARTMENT
143 Liberty Street
NEW YORK

JOHN G. JOHNSON
General Counsel
E. H. BOLES
General Solicitor
R. W. BARRETT,
Asst. General Solicitor
B. F. LARUE
Asst. General Solicitor

DECEMBER 20, 1915.
15277E

In re LEHIGH VALLEY LAKE LINE APPLICATION UNDER PANAMA CANAL ACT.

BLACKBURN ESTERLINE, ESQ.,
Special Assistant to the Attorney General,
Department of Justice, Washington.

DEAR SIR:

On September 14 I wrote you relative to the Lehigh Valley Transportation Company case under the Panama Canal Act and received in reply your letter of September 18th. I filed a petition with the Interstate Commerce Commission for a reargument, copy of which I sent you on September 15. A reargument was had and several days ago the Commission handed down a further opinion to the effect that they had jurisdiction in our case and denying our application for further relief. I want to test the matter in court. I have laid the ground for this by having a boat run from Chicago which reached Buffalo on December 16, or one day after the permissive order of the Commission expired.

Therefore, there has been a one-day violation of the law involved by our Company, and, frankly, I want the Attorney

General to sue us for a penalty. If we lose the case, of course the Department of Justice should be entirely reasonable and only ask for a nominal fine.

Will you talk the matter over with the Attorney General and advise me when I can see you and him for the purpose of a conference.

Sincerely yours,
(Signed) E. H. BOLES,
General Solicitor.

BD

EXHIBIT "F".

DEPARTMENT OF JUSTICE,
WASHINGTON.

December 21, 1915.

EDGAR H. BOLES, ESQ.,
General Solicitor, L. V. R. R. Co.,
143 Liberty St., New York, N. Y.

DEAR SIR:

Your favor of the 20th instant in the matter of the Lehigh Valley Lake Line application under Panama Canal Act, was received in my absence in St. Louis. The matter referred to therein is one which we will give careful consideration at the Attorney General's office and promptly advise you, Mr. Assistant Attorney General Underwood, with whom I am associated in such matters, is absent from the City. He will return in a day or so, when I will take the matter up.

Very respectfully yours,
(Signed) BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

EXHIBIT "G".

DEPARTMENT OF JUSTICE,
WASHINGTON.

JANUARY 18, 1916.

EDGAR H. BOLES, ESQ.,
General Solicitor, L. V. R. R. Co.,
143 Liberty St., New York.

DEAR SIR:

With reference to your favor of the 20th ultimo, *in re* Lehigh Valley Lake Line application under Panama Canal

Act, will advise that on receipt of the same I transmitted a copy to the Assistant Attorney General with whom I am associated in interstate commerce matters, with request that the suggestions made by you be given consideration. I have since spoken to him about the matter. Owing to his absence a great part of the time, and to pressure of other business, no action that I have learned of has been taken.

Have you had any conference with representatives of the Interstate Commerce Commission in the matter?

Early next week I must leave for the Pacific Coast to be gone ten days or two weeks.

Very respectfully yours,
(Signed) BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

MOTION FOR PRELIMINARY INJUNCTION, &c.
Filed Feby. 5, 1916.

NOW COMES the complainant herein by its Solicitor, R. W. Barrett, and moves this Honorable Court upon the verified Bill of Complaint filed herein, and the affidavits of Edgar H. Boles, Eben B. Thomas, Thomas N. Jarvis, Eugene J. Henry, T. Clem Beck, J. S. Brown, George A. Schroeder, and Charles A. Krause, and the accompanying exhibits attached to the Bill of Complaint, that an injunction *pendente lite* issue out of and under the seal of this Court, directed to the respondent and the Interstate Commerce Commission and its members, their agents, servants and representatives and each of them, restraining and enjoining them and each of them during the pendency of this suit from enforcing the said order of the Interstate Commerce Commission of May 7, 1915, and from taking any steps or instituting any proceedings for the enforcement thereof, and that the Court order the respondent to appear before it at a time to be fixed in such order and show cause why an injunction as aforesaid should not issue and for such other and further relief as the equities of this case may require.

LEHIGH VALLEY RAILROAD COMPANY,
By R. W. BARRETT,
Its Solicitor.

Phila., Pa., Feb. 5, 1916.

ORDER OF COURT.
Filed Feby. 5, 1916.

AND NOW upon reading and filing the motion for preliminary injunction herein and after hearing R. W. Barrett, Esq., Solicitor for complainant, it is hereby

ORDERED, that the respondent herein show cause, if any it has, before the Judges of the said Court at the Court Room in the Post Office Building, Ninth and Chestnut Streets, Philadelphia, in the Eastern District of Pennsylvania, on the 12th day of February, 1916, at ten o'clock A. M. in the forenoon, why a preliminary injunction should not issue against the respondent herein, and the Interstate Commerce Commission, and its members, pursuant to the prayer of the bill of complaint;

It is further ordered that on or before the 7th day of February, 1916, a copy of this order shall be served upon the defendant together with a copy of the said bill of complaint, plaintiff's affidavits and exhibits attached to the said bill of complaint, leaving a copy of all of the said papers at the office of the Attorney General of the United States in Washington, D. C., and further that on or before the said date, a copy of this order together with a copy of the said bill of complaint, complainant's affidavits and the exhibits attached to the said bill of complaint, shall be served upon the Interstate Commerce Commission, at the office thereof, by leaving a copy of the said papers with the Secretary of the said Commission.

It is further ordered that the said respondent shall, on or before the 12th day of February, 1916, and the Interstate Commerce Commission, on or before said date, serve upon the complainant solicitor, copies of all affidavits upon which it may rely in opposition to the said motion, and that the complainant shall at or before the hour of the hearing serve upon the respondent copies of any affidavits made in reply thereto.

JOHN B. MCPHERSON,
Circuit Judge.

ORDER OF COURT.
Filed Feby. 12, 1916.

SUR MOTION FOR PRELIMINARY INJUNCTION.

Per Curiam

AND NOW, to wit, February 12th, 1916, the application for a preliminary injunction in this case having come on to be heard before Joseph Buffington, John B. McPherson and Victor B. Woolley, three Circuit Judges in and for the Third Circuit of the United States, and upon due consideration had, the motion for a preliminary injunction is granted enjoining the defendants from preventing the Lehigh Valley Railroad Company from operating the line of vessels of the Lehigh Valley Transportation Company on the Great Lakes; and it further appearing to the court that both parties desire a speedy hearing of the case on final hearing, it is now ordered that March 17th, 1916, be fixed for such hearing before the said three Judges sitting at Philadelphia.

MOTION OF THE UNITED STATES TO DISMISS THE PETITION.
Filed Feby. 12, 1916.

United States of America, respondent, by its counsel, move to dismiss the petition, and shows:

1. The petition together with the exhibits referred to therein and made a part thereof is without equity on its face and does not state any cause of action against the respondent.

2. The reports and orders of the Interstate Commerce Commission were regularly made and entered after full hearing and on evidence adduced on issues made by the proper parties before the Commission, and the petition does not show any lack of power or authority on the part of the Commission to make and enter the said orders now sought to be annulled and enjoined.

3. The petition does not show that there is, or may be, any confiscation of property of petitioners, or that the petitioners

have been deprived of any right protected by the Constitution of the United States, or of any other right within the jurisdiction of the court to protect.

Wherefore, respondent prays that its said motion be sustained.

E. MARVIN UNDERWOOD,
Assistant Attorney General.

BLACKBURN ESTERLINE,
Special Asst. to the Atty. Gen.

FRANCIS FISHER KANE,
U. S. Attorney.

ANSWER OF THE UNITED STATES.
Filed March 13, 1916.

United States of America, respondent, by its counsel, not waiving its motion to dismiss the bill of complaint herein or any part of the same, but insisting upon the said motion and each and every part of the same now and at all times hereafter, for answer to the bill of complaint, says:

I—II. It admits the matters and things alleged in paragraphs 1 and 2, in manner and form as alleged.

III. It admits the matters and things alleged in paragraph 3, in manner and form as alleged, with these exceptions: It has no knowledge that Lehigh Valley Transportation Company is the corporate organization by which Lehigh Valley Railroad Company owns and operates certain water lines on the Great Lakes and elsewhere, and it neither admits nor denies the same, and if the same becomes material upon the hearing, it will require strict proof thereof. It admits that Lehigh Valley Transportation Company is operated in connection with Lehigh Valley Railroad Company, but it denies that Lehigh Valley Transportation Company is operated merely as a continuation of the railroad of Lehigh Valley Railroad Company: It has no knowledge that Lehigh Valley Railroad Company is authorized by its charter under the laws of the State of Pennsylvania to own the capital stock of Lehigh Valley Transportation Company, and it neither admits nor denies

the same, and in so far as the same may become material upon the hearing, it will require strict proof thereof.

IV. It admits the allegations of paragraph 4, in manner and form as alleged, with these exceptions: It has no knowledge of the exact names, classes, gross and net tonnage, dates of construction, cost and present values of the respective steel vessels owned and operated by Lehigh Valley Transportation Company on the Great Lakes, and it neither admits nor denies the same, in manner and form as alleged, and in so far as the same may become material upon the hearing, it will require strict proof thereof: It denies that the said vessels are operated solely and merely as part of the through line with Lehigh Valley Railroad Company for the transportation of freight between the Atlantic Seaboard and points on the Great Lakes.

V. It has no knowledge of the matters and things alleged in paragraph 5, and it neither admits nor denies the same, and in so far as the same may become material upon the hearing, it will require strict proof thereof, with this exception: It admits that LehighValley Railroad Company now owns, and for some years past has owned, the entire capital stock of Lehigh Valley Transportation Company.

VI. It has no knowledge of the matters and things alleged in paragraph 6, in manner and form as alleged, and it neither admits nor denies the same, and if the same become material upon the hearing, it will require strict proof thereof, with this exception: It admits that Lehigh Valley Transportation Company owns and operates the six steam vessels, that its property investment therein is very large, and that Lehigh Valley Railroad Company owns the entire capital stock of Lehigh Valley Transportation Company.

VII. It neither admits nor denies the matters and things alleged in paragraph 7, in manner and form as alleged. For the exact language of the provisions of Section 5 of the Act to Regulate Commerce, as amended by Section 11 of the Panama Canal Act, approved August 24, 1912, respondent refers to the said Act as officially reported in Volume 37, United States Statutes At Large, 701.

VIII. It admits the matters and things alleged in paragraph 8, in manner and form as alleged.

IX. It admits that petitioner filed the application with the Interstate Commerce Commission, a copy of which is attached to the bill of complaint as Exhibit A. It has no knowledge that petitioner was advised by counsel that the Panama Canal Act was unconstitutional and void and that the petitioner felt constrained, because of the penalties in said Act to Regulate Commerce against any violation of any provisions thereof, to file the said application with the Interstate Commerce Commission, in manner and form as alleged, and it neither admits nor denies the same. and if the same becomes material upon the hearing, it will require strict proof thereof.

X. It admits that on May 12, 1914, and succeeding days, the hearing was conducted by and before the Interstate Commerce Commission and that the petitioner submitted evidence in support of said application: It admits that on May 7, 1915, the Interstate Commerce Commission made its report and order upon said application: It admits that the said application was heard separate and distinct from other pending applications: It admits that the Commission made the joint report and order covering other applications similar to that of the petitioner: It admits that the said report appears under the title "Lehigh Valley Railroad Company (Lehigh Valley Transportation Company; Lake Line only)," Volume 33, Interstate Commerce Commission Reports, 699-716, and that, pursuant to said report, the Commission entered the order. As to the remaining allegations of the said paragraph 10, particularly in the first part thereof relating to the evidence submitted to the Interstate Commerce Commission, the character, purport and weight thereof, and what the same established, this respondent denies the same, and each and every part of the same, in manner and form as alleged.

XI. It admits the matters and things alleged in paragraph 11, with this exception: It denies that the counsel for the petitioner, on October 23, 1915, or at any other time, by oral argument and printed brief, called to the attention of the said Commission any arbitrary and unlawful taking of the petitioner's property under the Commission's order of May 7, 1915.

XII. It denies the matters and things alleged in paragraph 12, and each and every part of the same, in manner and form as alleged.

XIII. It denies the matters and things alleged in paragraph 13, and each and every part of the same, in manner and form as alleged.

XIV. It denies the matters and things alleged in paragraph 14, and each and every part of the same, in manner and form as alleged, with this exception: It admits that if said order remains in effect, the petitioner will be unable any longer to own the capital stock of Lehigh Valley Transportation Company which uses in interstate transportation the six steel steam vessels as hereinbefore described.

XV. It denies that petitioner made every effort to secure a quick and adequate interpretation of the law in respect of its status as a competitor of its boat line, Lehigh Valley Transportation Company: It denies that there has been no delay on the part of the petitioner to secure an adjudication of its right under the law to continue in its ownership of the capital stock of the Lehigh Valley Transportation Company, which operates steamboats on the Great Lakes: It alleges that the General Solicitor of Lehigh Valley Railroad Company did not inform the Department of Justice through the Special Assistant to the Attorney General, or otherwise, that Lehigh Valley Railroad Company was contemplating the commencement of a suit in equity against the United States to enjoin the action of the Interstate Commerce Commission and was withholding the filing thereof pending a definite answer to his communications or that he would use, or might use, the correspondence he was conducting for the purpose of laying the foundation for a suit in equity against the United States, or that the short periods of delay were of any consequence. Had he done so, or even intimated anything of the kind, even in his first communication, he would have promptly received a decisive answer.

XVI. It has no knowledge of the matters and things alleged in paragraph 16, in manner and form as alleged, and it neither admits nor denies the same, and if the same becomes material upon the hearing, it will require strict proof thereof,

with this exception: It denies that the said order, if the same is allowed to remain in force and effect, will cause petitioner such irreparable injury and damage as would entitle it to an injunction to restrain the enforcement thereof.

XVII. It alleges that the matters and things alleged in the bill of complaint, and sought to be put in issue, were all before the Interstate Commerce Commission, and were fully heard and determined by it, and were within its power and authority to hear and determine under the statute in such case made and provided. In its two reports in writing with respect thereto, made after full hearings and due notice to the petitioner, which state its conclusions, together with its decision, order, or requirement in the premises, the matters and things of which complaint is now made were fully considered and foreclosed by findings of fact, based on substantial evidence adduced on the issues made by the parties.

XVIII. Further answering the bill of complaint, and each and every part of the same, in so far as it has not heretofore been admitted, denied, or otherwise traversed, it denies—

(a) Any fact or facts alleged which deny, or which seek to deny, any fact or facts found by the Interstate Commerce Commission in its said reports and orders.

(b) Any fact or facts alleged which are inconsistent with any fact or facts found by the Interstate Commerce Commission in its said reports and orders.

(c) Any and all inferences of fact from any particular fact or facts alleged which seek to deny, or which are inconsistent with, any fact or facts found by the Interstate Commerce Commission in its said reports and orders.

(d) Any fact or facts alleged which set up, or which seek to set up, matters and things which were not before the Interstate Commerce Commission.

(e) Any fact or facts alleged which attack or which seek to attack the reports and orders of the Interstate Commerce Commission, and to show facts other than what the said reports and orders show on the face thereof.

(f) Any allegations which allege that facts were found by the Interstate Commerce Commission in its said reports and orders which, as shown on the face thereof, in fact were not so found.

(g) Any conclusions of law alleged and insisted upon which are inconsistent with any conclusions of law held by the Interstate Commerce Commission in its said reports and orders.

(h) Each and every allegation in the said bill of complaint contained not herein specifically admitted or denied.

Wherefore, having fully answered, respondent prays that the bill of complaint be dismissed at the cost of the petitioner, and for such other and further order as may be appropriate.

E. MARVIN UNDERWOOD,
Assistant Attorney General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

FRANCIS FISHER KANE,
United States Attorney.

MOTION TO DISMISS AND ANSWER OF THE INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT.

Filed February 12, 1916.

The intervening respondent, Interstate Commerce Commission, moves to dismiss the petition herein and for cause says: that the petition herein does not present a justiciable issue triable by this court, in that it does not appear that this respondent was without jurisdiction under the act to regulate commerce to enter the order referred to in the petition; or that this respondent did not grant a full hearing to the parties before the entry of said order; or that there was any illegality in the proceeding before this respondent prior to the entry of said order, or that there was no substantial evidence to support said order; nor does the petition set forth any or suffi-

cient facts to show confiscation of the property of petitioner, or any other violation of the constitutional rights of the petitioner entitling it to the relief or any part thereof prayed for.

Not waiving its objection to the sufficiency of the petition this respondent for answer to that pleading, says:

I.

The statements made in the first paragraph of the petition are true.

II.

This respondent admits the allegations of the second paragraph of the petition.

III.

For answer to the third paragraph of the petition this respondent admits the allegations of said paragraph subject to the qualification that the allegation that petitioner is authorized by its charter under the laws of the State of Pennsylvania to own the capital stock of the Lehigh Valley Transportation Company is admitted only for the purposes of this case.

IV.

For answer to the fourth paragraph of said petition this respondent admits the allegations of said paragraph for the purposes of this case.

V.

For answer to the fifth paragraph of the petition this respondent admits for the purposes of this case the allegations of said paragraph.

VI.

For answer to the sixth paragraph of the petition this respondent admits that the property investment of petitioner in the steamboats which it operates on the Great Lakes through the Lehigh Valley Transportation Company is very large, and this respondent admits for the purposes of this case the allegations of said paragraph as to the value of said steamboats, and as to the ownership and value of the terminals referred to therein, and also as to the character of the leases under which said terminals are held.

VII.

For answer to the seventh paragraph of the petition this respondent refers to the Act of Congress approved August 24, 1912, known as the Panama Canal Act and to the fifth section of the Act to Regulate Commerce as amended thereby.

VIII.

For answer to the eighth paragraph of the petition this respondent admits the allegations of said paragraph.

IX.

For answer to the ninth paragraph of the petition this respondent admits that petitioner on January 21, 1914, filed with the Interstate Commerce Commission its application for a hearing in reference to the fact of competition or the possibility of competition between itself and the Lehigh Valley Transportation Company and prayed that an order be issued to the end that the service by water of the said Lehigh Valley Transportation Company's steam vessels might continue to be operated by the petitioner after July 1, 1914, and this respondent further admits that the copy filed with said petition as Exhibit "A" is a true copy of said petition. This respondent further states that the allegations of said paragraph as to the advice given to petitioner by its counsel and as to the reasons which moved petitioner to file its said application tender issues which are irrelevant, and, therefore, immaterial.

X.

For answer to the tenth paragraph of the petition this respondent admits that said petition was heard by this respondent as stated in said paragraph, and that petitioner submitted evidence in support of said application, but this respondent states that upon said application this respondent heard and considered other evidence in addition to that submitted by petitioner. This respondent further admits that on May 7, 1915, this respondent made its report and order upon said application, and also admits the allegations of said paragraph as to the separate hearing of said application by this respondent and the making of a joint report and order

covering other similar applications. A copy of said joint report and order are filed herewith as part hereof marked Exhibit "A." This respondent further states that the allegations of said paragraph as to what the evidence submitted by petitioner upon the hearing of said application established tender issues which this court has no power to determine, but which were and are issues wholly within the jurisdiction of this respondent, and the findings of this respondent upon the evidence are set forth in its said report and in its supplemental report hereinafter referred to. And this respondent further states that the only inquiry which this court has the power to make as to the evidence heard by this respondent upon said application is the inquiry as to whether or not there was substantial evidence before this respondent to authorize and support this respondent's said findings and to authorize and support its said orders. Further answering said paragraph, this respondent denies that it did by its said report find in the alternative that the petitioner did or might compete with said Lehigh Valley Transportation Company, and states that it found that petitioner did then so compete, as appears from said report.

XI.

For answer to the eleventh paragraph of the petition this respondent admits that petitioner on September 17, 1915, filed its petition for a rehearing on its said application; that upon said petition the matter was by order entered October 5, 1915, set for further argument on October 23, 1915; and that on the date so set petitioner was heard both in oral argument and by printed brief; but respondent denies that petitioner called its attention to any arbitrary or unlawful taking of petitioner's property under said order of May 7, 1915, and denies that there was or is or will be any arbitrary or unlawful taking of petitioner's property under said order. This respondent for further answer to said paragraph admits that on December 13, 1915, it made its report and order upon said application for a rehearing, and reaffirmed its former order and report and dismissed petitioner's said application for a rehearing. A copy of said supplemental report and order is filed herewith as part hereof marked Exhibit "B." This re-

spondent admits that the effective date of the order of the Commission of May 7, 1915, as reaffirmed was postponed by a subsequent order of this respondent from December 1, 1915, to December 15, 1915.

XII.

For answer to the twelfth paragraph this respondent denies that the fifth section of the act to regulate commerce as amended by said Act of August 24, 1912, known as the Panama Canal Act, is unconstitutional or void for the reasons stated in said paragraph or for any other reason, and denies that the said orders of the Commission made in said proceeding are unlawful or void.

XIII.

For answer to the thirteenth paragraph of the petition this respondent denies that it arbitrarily or without evidence upon which to base its said orders of May 7, 1915, and December 13, 1915, deprived petitioner of the use of any property whatever, and denies that the findings in its reports, upon which said orders were based, that petitioner did and could compete with the line of steamboats operating on the Great Lakes and owned as aforesaid by the Lehigh Valley Transportation Company were made unlawfully or without basis in fact or in law, and denies that its said orders were arbitrarily or unlawfully made. And by way of further answer to the charge that this respondent's said findings and orders were arbitrarily made this respondent states that there was substantial evidence before this respondent to authorize and support said findings and orders. And this respondent further states that the allegations in said paragraph that certain things were demonstrated to this respondent tender issues which this court has no power to determine and are therefore immaterial.

XIV.

For answer to the fourteenth paragraph of the petition this respondent denies that its said order of May 7, 1915, or its said order of December 13, 1915, arbitrarily or unlawfully deprives petitioner of property of value. This respondent further answering said paragraph admits that if said order

remains in effect petitioner will be unable through its ownership of the capital stock of the Lehigh Valley Transportation Company to use in interstate transportation the steam vessels described in the petition or any of them. This respondent states that the allegations of other facts in said paragraph tender issues which are irrelevant and, therefore, immaterial.

XV.

This respondent for answer to the fifteenth paragraph of the petition states that the allegations of said paragraph as to correspondence of petitioner with the Department of Justice and as to efforts of petitioner to secure through that department a quick and adequate interpretation of the law as here involved tender issues which are irrelevant and, therefor, immaterial. This respondent denies, however, that there has been no delay on the part of petitioner in its efforts to secure an adjudication of its right under the law to continue in its ownership of the capital stock of the Lehigh Valley Transportation Company.

XVI.

For answer to the sixteenth paragraph of the petition this respondent for the purposes of this case admits the allegations of said paragraph, but this respondent states that said order of the Commission if allowed to remain in effect will not cause petitioner such irreparable damage as entitle petitioner to an injunction to restrain the enforcement of said order.

XVII.

Further answering this respondent denies any conclusions of law alleged in the petition which are inconsistent with any conclusions of law stated by this respondent in its said reports and orders, and any facts or inferences alleged in said petition which are inconsistent with the findings of this respondent in its said reports and orders. And this defendant further says that it had full jurisdiction over the matters in controversy before it; that its jurisdiction as to said matters is primary and conclusive; and that said conclusions of fact in said matters in controversy are final and conclusive

upon the petitioner; and that the petitioner is in duty bound to obey said orders.

Wherefore, having fully answered this respondent prays that the petition be dismissed at the costs of the petitioner, and for such other and further relief as may be appropriate in the premises.

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
EDWARD W. HINES,
Counsel for Interstate Commerce Commission.

CITY OF WASHINGTON, DISTRICT OF COLUMBIA, *ss.*:

I, Charles C. McChord, on oath depose and say that I am a member of the Interstate Commerce Commission and make this affidavit on behalf of said Commission: that I have read the foregoing answer and know the contents thereof and the same is true.

CHARLES C. MCCHORD.

Subscribed to and sworn to before me, a Notary Public within and before the District of Columbia, this 11th day of February, A. D. 1916.

ALFRED HOLMEAD,
(Seal) *Notary Public.*
My commission expires July 23, 1919.

EXHIBIT "A."

2985

INTERSTATE COMMERCE COMMISSION.

LAKE LINE APPLICATIONS UNDER PANAMA CANAL ACT.

No. 6381.

PENNSYLVANIA RAILROAD COMPANY AND NORTHERN CENTRAL RAILWAY COMPANY (ERIE & WESTERN TRANSPORTATION COMPANY—ANCHOR LINE).

No. 6504.

LEHIGH VALLEY RAILROAD COMPANY (LEHIGH VALLEY TRANSPORTATION COMPANY; LAKE LINE ONLY).

No. 6570.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY (MUTUAL TRANSIT COMPANY).

No. 6573.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY (WESTERN TRANSIT COMPANY).

No. 6603.

RUTLAND RAILROAD COMPANY (RUTLAND TRANSIT COMPANY).

No. 6615.

ERIE RAILROAD COMPANY (ERIE RAILROAD LAKE LINE).

No. 6616.

ERIE RAILROAD COMPANY (MUTUAL TRANSIT COMPANY ONLY).

No. 6624.

GRAND TRUNK RAILWAY COMPANY OF CANADA (CANADA ATLANTIC TRANSIT COMPANY ONLY).

No. 6631.

LEHIGH VALLEY RAILROAD COMPANY (MUTUAL TRANSIT COMPANY).

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No. 6765.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY (RUTLAND TRANSIT COMPANY).

No. 6874.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY (MUTUAL TRANSIT COMPANY).

Submitted December 17, 1914. *Decided May* 7, 1915.

Upon applications of certain railroads under the Panama Canal act for an extension of time during which their interest in and operation of certain boat lines plying on the great lakes might be continued; *Held*:

1. That the physical fact of ports of call being served in common by the boats and the paralleling rails of the owning railroad establishes a case of competition existing between the owning railroad and its boat line.
2. That the case is the same where the railroad entity which owns the boat line also owns, through stock control, another railroad entity, or is an integral part of a system of railroad whose paralleling rails serve ports of call in common with the boats.
3. That where an owning railroad is a party to through all-rail routes or a member of "fast freight lines" or an association of railroads owning boat lines whose function is to keep the operation of their boat lines from interfering with the rail operations, the interest it thus maintains in common with the rail carriers whose rails do compete with its boat line is such an interest as the act provides against, and that it is possible for such an owning railroad to compete with its boat line for traffic, within the meaning of the act.
4. That the purpose of the Panama Canal act was to preserve

to the common interest of the people, free and unfettered, the "water roadbed" via the Panama Canal. Also to restore all the water routes of the country to the same condition of freedom from domination that would reduce their usefulness as a natural means of transportation.

5. That Congress has decreed that there shall be a restoration of conditions which prevailed when railroads had no interest in and exercised no control over the boat lines plying upon the country's water routes. The inquiry in these cases is, Is the joint operation of these boat lines such as to make of them an exception?

6. That upon the respective records herein concerned, none of the several existing specified services by water is being operated in the interest of the public or is of advantage to the convenience or commerce of the people within the meaning of the act, and that an extension of the respective interests of the petitioners therein will prevent, exclude, and reduce competition on the great lakes. The application of each of the petitioners herein is therefore denied, effective December 1, 1915.

G. S. Patterson, Henry Wolf Bikle, and *C. C. McCain* for Pennsylvania Railroad Company, Northern Central Railway Company, Pennsylvania Company, and Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

F. E. Williamson for Buffalo Chamber of Commerce.

J. H. Barnes for Commercial Club of Duluth.

H. C. Barlow for Chicago Association of Commerce.

Cassoday, Butler, Lamb & Foster for Freight Traffic Committee of Chicago Association of Commerce.

W. H. Follette for Follette lines.

G. R. Hall for Traffic Commission of Duluth.

G. S. Patterson for Erie & Western Transportation Company.

R. W. Barrett for Lehigh Valley Railroad Company.

C. J. Austin for New York Produce Exchange.

H. A. Taylor and *M. B. Pierce* for Erie Railroad Company.

Davis, Kellogg & Severance, S. W. Burr, and *F. J. Morley* for St. Paul Association of Commerce and Minneapolis Civic & Commerce Association.

O. E. Butterfield and *G. P. Lynde* for New York Central Lines.

J. C. Lincoln for Merchants Association of New York.

W. L. Jenks for Port Hudson and Duluth Steamship Company.

E. W. Lawrence for Rutland Railroad Company.

L. T. Michener, P. G. Michener, and *L. C. Stanley* for Grand Trunk Railway Company of Canada.

J. L. Seager for Delaware, Lackawanna & Western Railroad Company.

H. La Rue Brown, special assistant to the Attorney General, for the United States.

REPORT OF THE COMMISSION.

McCHORD, *Chairman*:

These cases are before this Commission upon petitions filed in accordance with the provisions of section 5 of the act to regulate commerce, as amended by the Panama Canal act of August 24, 1912. The petitioners are rail carriers owning or having an interest in one or more boat lines with boats plying on Lakes Ontario, Erie, Huron, Michigan, and Superior, hereinafter referred to as the great lakes. There has been no order consolidating these cases, but they were heard together. Each case has been considered and decided upon its own record, but as all of the cases involve many points in common, they will be disposed of in one report.

The Anchor line, whose corporate title is Erie & Western Transportation Company, is owned jointly by the Pennsylvania Railroad Company and the Northern Central Railway Company, which latter company is operated under lease by the Pennsylvania Railroad Company, and operates 12 vessels serving the ports of Buffalo, Erie, Cleveland, Detroit, Mackinac Island, Milwaukee, Chicago, Sault Ste. Marie, Marquette, Hancock, Houghton, Superior, and Duluth. It may be noted that since the evidence in these cases was completed, the Northern Central Railway Company has been merged with the Pennsylvania Railroad Company.

None of the ports served by the Anchor line is reached by the rails of the Pennsylvania Railroad Company except the interchange ports of Buffalo and Erie. The Pennsylvania

Railroad Company, however, owns the Pennsylvania Company, which latter company operates a railroad with tracks reaching Cleveland and Chicago.

The Mutual Transit Company is owned by the Mutual Terminal Company, which in turn is jointly owned by the Lehigh Valley Railroad Company, the Erie Railroad Company, the Delaware, Lackawanna & Western Railroad Company, and the New York Central & Hudson River Railroad Company. The four dockets, Nos. 6616, 6631, 6570, and 6874, involve the independent applications of these roads and their indirect interest in this company.

The Mutual Transit Company operates 12 vessels serving the ports of Buffalo, Fairport, and Cleveland on Lake Erie; the ports of Gladstone and Green Bay on Lake Michigan; and the ports of Duluth, Hancock, Houghton, Hubble, Fort William, Port Arthur, and Westport on Lake Superior. Two of the owning railroads, viz., the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company, do not reach with their rails any of the ports served by this line other than the interchange port of Buffalo. The New York Central & Hudson River Railroad Company, over the Lake Shore & Michigan Southern and its other allied lines, reaches Chicago and Cleveland by rail, as does also the Erie Railroad, over the rails of its subsidiary, the Chicago & Erie Railroad Company.

The Lehigh Valley Transportation Company is owned by the Lehigh Valley Railroad Company and is in addition to this railroad's interest in the Mutual Transit Company line. The only port served in common by the rails and the boats of this line is Buffalo, the port of interchange.

The Western Transit Company is owned by the New York Central & Hudson River Railroad Company, and is in addition to that road's interest in the Mutual Transit Company. The boats of this line operate from Buffalo to Lake Michigan and Lake Superior ports, serving Chicago in common with the rails of this railroad system.

The Rutland Transit Company is owned by the Rutland Railroad Company, which in turn, through the ownership of 26 per cent. of the stock, is controlled by the New York Central & Hudson River Railroad Company. Forty-eight per cent.

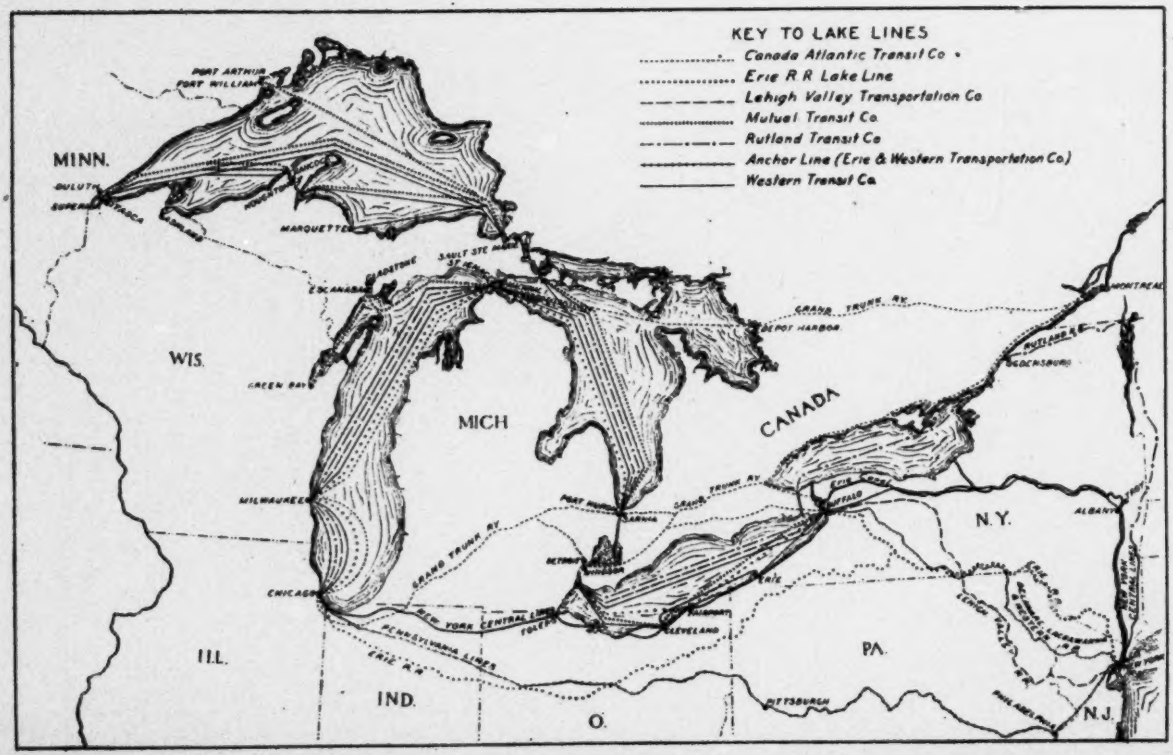
of the stock in the Rutland Railroad Company is in the hands of the public. The other 26 per cent. was turned over to the New York, New Haven & Hartford Railroad Company by the New York Central & Hudson River Railroad Company. This line runs boats between Ogdensburg, N. Y., and Milwaukee, Wis., and Chicago, Ill. The rails of the Rutland Railroad extend no farther west than Ogdensburg and serve no other port save this port of interchange, but, as before indicated, the rails of lines allied with the New York Central reach Chicago.

The Canada Atlantic Transit Company is owned by the Grand Trunk Railway Company of Canada, and operates a fleet of three steamers between Depot Harbor on Georgian Bay, in the province of Ontario, and Chicago and Milwaukee. Rails of the Grand Trunk Railway Company of Canada reach Depot Harbor, which is the only port served in common with the boats of its transit line, but by reason of its ownership through stock control of the Grand Trunk Western Railway Company, it reaches Chicago and Port Huron over the rails of that line.

The Erie Railroad lake line is simply the designation given to the boats which are operated by the Erie Railroad Company as a part of its system. There is no distinct corporate entity existing between the two, and the boat line and the railroad are operated as one system. These boats ply between the ports of Buffalo and Fairport, Ohio, on Lake Erie, serving Milwaukee, Wis., and Chicago, Ill., on Lake Michigan, and touching at Manitowoc. None of the ports served by the boats of the Erie Railroad is reached by the rails of that road other than the interchange port of Buffalo, but the Erie Railroad Company owns the capital stock of the Chicago & Erie Railroad Company, which operates a road from Marion, Ohio, to Chicago, and over the rails of this road it does reach Chicago in common with its boats.

The accompanying map shows the routes of each of these boat lines and the ports of call, together with the rail lines of the several petitioners.

The first controlling question arising under these applications is whether or not, within the meaning of the Panama Canal amendment, there is or may be competition for traffic


KEY TO LAKE LINES
Canada Atlantic Transit Co.
Erie R R Lake Line
Lehigh Valley Transportation Co
Mutual Transit Co.
Rutland Transit Co
Anchor Line (Erie & Western Transportation Co.)
Western Transit Co.
MINN.
WIS.
MICH
CANADA
N.Y.
PA.
N.J.
ILL.
IND.
O.
PORT ARTHUR
FORT WILLIAM
DULUTH
SUPERIOR
MARQUETTE
SAULT STE MARIE
MACKINAC
GREEN BAY
MILWAUKEE
CHICAGO
DETROIT
CLEVELAND
BUFFALO
ALBANY
MONTREAL
DEPOT HARBOR
ROCHESTER
PITTSBURGH
GRAND TRUNK RY.
NEW YORK CENTRAL LINES
PENNSYLVANIA LINES
ERIE R'R
LEHIGH VALLEY R.R.

between the vessels operated and the railroad interested in them.

This question would be easily answered in the affirmative if the ports of call were served in common by the boats and by the paralleling rails of the owning railroad. The physical situation would itself establish the case. It appears, though, that no such case is made out on the records here presented, since no two ports of call are served in common by the boats and the paralleling rails of the particular owning railroad entity. It is a fact, however, that in the case of the Pennsylvania Railroad Company, New York Central and Hudson River Railroad Company, Erie Railroad Company, and the Grand Trunk Railway Company of Canada, the railroad entity owning the boats or the interest therein also owns, or has an interest in, other railroad entities whose paralleling rails do serve ports of call in common with the boats.

It is urged that this does not establish a case within the meaning of the act and that the act only applies to cases where there is competition, actual or potential, between the boats and the rails actually operated by the owning entity. This position takes no account of the extremely broad language used, to define the character of inter-ownership which the act was meant to reach:

From and after the 1st day of July, 1914, it shall be unlawful for any railroad company or other common carrier subject to the act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

The unsoundness of the contention is at once manifest when it is seen how in every case the act could be evaded by a reorganization incorporating the paralleling rails which

reach the port of call into a railroad entity distinct from the entity owning the boats, with the real ownership, through stock control, remaining as before. The contention is faulty and is contrary to the spirit as well as the letter of the act.

The interest existing between the several portions of the New York Central system and the several boat lines in which it is a stockholder is the kind of interest which the act was intended to reach. The same is true of the Pennsylvania system, the Erie, and the Grand Trunk. Each of these four systems has such an interest as the act defines in a boat line or lines which does or may compete with rails forming the respective system.

The case of the Rutland Railroad Company and its interest in the Rutland Transit Company presents another phase of a like situation, since it is allied with the New York Central system. Here the boats, as well as the paralleling rails, are owned by separate entities which in turn are partly owned by the common entity, the New York Central. The community of interest or interownership is just as potent in this case as in the above-mentioned cases. It should be noted that the extent of the common interest is in no wise specified in the act. The boats of the Rutland Railroad do or may compete, therefore, with the rails of the system.

It might occur that these railroads might relieve themselves of the operation of the act by simply canceling the service to Chicago, the common point, but this would not be so. A situation where competition prevails might be said to be the antithesis of monopoly. In canceling the boat service to a concentrating port like Chicago the railroads would have used their ownership to produce the inhibited result. This amendment to the act to regulate commerce was primarily intended to secure to the commerce of the country, moving via the Panama Canal, freedom from control by the transcontinental rail lines which might be affected and thereby to promote competition between these carriers and vessels plying on this water route. It was then thought wise to extend the same legislative idea to water transportation "elsewhere" in the country. So that this part of the amendment, *construed alone*, demands a cessation of any interest or control tending toward monopoly or a lessening of that competition between

rail and water routes which would prevail under separate ownership and management.

The case presented by the applications of the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company requires a further consideration of the relation these roads bear toward the traffic hauled, or, rather, which might be hauled, by their boat lines. As before noted, the boat lines owned or in which these railroads have an interest, with the exception of the interchange port of Buffalo, serve no points in common with the rails of any part of the owning railroad system.

Each of these roads, however, is a party to through all-rail routes and joint rates to all the ports served by its boats with respect to westbound and eastbound traffic. All of the principal carriers in central freight association territory concur in these rates, including the lines west of Buffalo, which form parts of systems controlled by the petitioning trunk line carriers. The concurrences in the Lehigh Valley rates are shown in Lehigh Valley R. R. I. C. C. B-9000. The concurrences in the Delaware, Lackawanna & Western rates are shown in Delaware, Lackawanna & Western R. R. I. C. C. No. 9400. These carriers in common with all other trunk line roads make through passenger fares from points on their lines to all central freight association points, including ports served by their boats, in connection with all central freight association carriers who concur in C. L. Hunter's Trunk Line Tariff I. C. C. A.-75; Joint Passenger Tariff No. 15. They are also members of the Lake Lines Association and are parties to certain fast freight line arrangements. The effect of such alliances on their boat lines indicates that these railroads are parties to arrangements which make them competitors of their boat lines.

The through all-rail routes and joint rates which these roads maintain with carriers connecting at their lake interchange ports for points beyond, including the ports served by their boats, are legitimate and necessary arrangements for the convenience and facility of their rail transportation.

These petitioners, in connection with all central freight association territory rail carriers, as shown by their concurrences, are the joint makers of tariffs publishing joint through

rates for the all-rail transportation to and from the ports served by their boats. The only thing to indicate that the entire all-rail haul is not performed by their respective lines is the concurrence of their connections in these rates. Together with their connections they make a through line from the east to the lake ports over which both eastbound and westbound traffic moves all rail. They originate the westbound traffic and control its routing. The actual result of these arrangements is the same as if these petitioners owned the rails reaching these ports.

The all-rail connections of the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company, which participate in the through route west of Buffalo, are capable of delivering to these roads at Buffalo many times the volume of eastbound tonnage that it would be possible for these roads to originate through the medium of their own boat lines and deliver to their rails at Buffalo. These petitioning roads, therefore, are very solicitous to promote and improve their relations with their western rail connections. Through route arrangements are reciprocal, since the entire movement of traffic is not in the one direction. So the one most potent way in which these petitioning roads can encourage a routing of the eastbound traffic from these western rail connections over their rails is to route as much westbound traffic as possible over the particular connection or connections which are able to furnish the most eastbound traffic. The westbound traffic which is so routed is necessarily diverted from the boats of these petitioners. This sacrifice of the boat lines is small when compared to the gains made by these petitioning carriers in the interchanging of all-rail traffic. The eastbound all-rail traffic in almost every instance might just as well be turned over at Buffalo to one of the several rivals of the petitioners extending east. The striving or rivalry for this eastbound traffic causes these petitioners to divert westbound traffic from their boats, and when they do this they are competing with their boats within the meaning of the act as amended.

That the existence of paralleling through all-rail routes to which joint through rates are applicable, in which the petitioning railroad participates, is a circumstance bringing any

application under this amendment within its provisions, seems clear when the amendment is considered in its application to the railroad ownership of, or interest in, boats operating through the Panama Canal. At the time the amendment became a law, nor now, is there any transcontinental rail line owned or operated by a single railroad or system of railroads in the United States. If, therefore, the participation of a petitioning railroad in such through route arrangement does not constitute an arrangement by which it is possible for it to compete with its boats operating through the Panama Canal from and to common points, then this amendment, as applied to traffic through the Panama Canal, is of no effect.

The "fast freight line" was the forerunner of the through route and had its origin in the lack of arrangements for the interchange of equipment. These fast freight lines acquired large numbers of freight cars and made arrangements with certain roads over which it was desired to establish a through service. This through service could be established by using several different combinations of roads, so there was the same rivalry and striving between these several roads to be members of the particular fast freight line as exists under through route arrangements. The through route established, their business then is to solicit through shipments of freight to move all rail over the "line" that has been organized. To this end soliciting offices were established in many trade centers. The participation in these "fast freight lines" entails the same sacrifice on the part of these petitioners' boat lines as was pointed out with respect to the through route arrangements. These roads are members of "fast freight lines" which are still in existence, and in the nature of things the best interests of their boat lines are made subservient to the interests of their rails, which, of course, are of much greater importance.

The Lehigh Valley Railroad Company is a party to and has a proprietary interest in the Traders Dispatch and the Lehigh Valley-Wabash Dispatch, fast freight lines reaching Chicago and Milwaukee, ports served by boats of the Lehigh Valley Transportation Company. This petitioner in the year 1913 contributed $69,208.27 to cover its share toward the maintenance of the Traders Dispatch.

The Delaware, Lackawanna & Western Railroad Company is a party to and has a proprietary interest in the Lackawanna-Lake Shore line, operating over petitioners' line to Buffalo, then over the Lake Shore & Michigan Southern Railroad and its western connections to Chicago and points west; the Lackawanna-Michigan Central line, operating over petitioner's route to Buffalo and then over the Michigan Central and its western connections to Chicago and points west; the Wabash-Lackawanna Dispatch, operating over petitioners' rails to Buffalo, then over the Wabash Railroad and its western connections to Chicago and points west; and the Lackawanna line, operating over petitioners' rails to Buffalo, thence over the New York, Chicago & St. Louis Railway Company and its western connections to Chicago and points west. For the year ending December 31, 1913, the Delaware, Lackawanna & Western paid to the Lackawanna line as its proportion of maintaining the same, $87,758.57, which went in part to defray expenses of maintaining freight-soliciting agencies in Chicago, Cincinnati, Des Moines, Indianapolis, Kansas City, Peoria, St. Louis, and St. Paul.

The Lehigh Valley Railroad Company insists that if its participation in these fast freight lines and contributions to them is wrong and contrary to the law, it is ready and willing to make any changes that might be suggested by the Commission. While such a position is commendable, these cases are to be tried on facts, not promises for future performances, and under the amendment, the Commission is empowered only to pass on the facts of past and present conditions as presented.

It is to be noted that the Rutland Railroad Company is a party to "fast freight lines," known as the Rome, Watertown, and Ogdensburg route and the Rutland-Michigan Central route, which are lines serving western points in competition with the boats of the Rutland Transit Company. It is also a party to through routes and joint rates to the ports served by its boats.

The Lake Lines Association is an "understanding organization" which, while claiming not to be an organized agency, has held meetings, the records of which, as shown in the evidence presented in these cases, indicate that its function is to

insure a "proper" management of these lines, from the viewpoint of the railroads, which could not have been possible if their operation were unrestrained. The whole arrangement might be classed as a "get together movement" to which all the roads here petitioning are parties. While these two petitioning roads which are here specifically under consideration may not directly compete with their boat lines over the rails of their systems, their membership and activity in this association or participation in any like understanding places them in a position inimical to the best interests of their boat lines. Placed in such an attitude these roads, through the agency of other roads with which they are "partners" become the competitors of their own boat lines.

The lake lines in which the petitioners are interested have been shorn of the initial rate-making power. This power has been usurped by the trunk line association of which the petitioners are members. The through rates controlled by this authority, in which the boat lines are merely concurring carriers, determine for the shipper which lake line must be used. The particular route is controlled by applying arbitrary switching charges at Buffalo, which compel the through lake-and-rail traffic to move via the predetermined lake line. The zones of territory to be served and those not to be served by the lake lines are also determined by this outside authority. This is accomplished by maintaining a scale of rates, not subject to competition, that forces traffic by either all-rail or lake-and-rail routes, as desired by the trunk line association. The interest and concern of the trunk line association in fixing these different combinations of rates is simply the solidified interest of the several member railroads, whose individual interests have been above indicated.

What has been said with special reference to the petitioners Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company applies with equal force to each of the other petitioners herein, since each is a party to through all-rail routes reaching the several ports served by their boats, as well as a member of the Lake Line Association.

From a consideration of all the circumstances the Commission is of opinion, and finds, that each of the applicants

here involved does or may compete for traffic with the lake line or lines in which it has an interest.

In the present cases, however, which are not applications for the extension of a service operating through the Panama Canal, the finding that competition, actual or potential, exists does not *ipso facto* require the separation of the petitioning railroads from the boat lines in which they are interested within the meaning of the act.

In extending to all water commerce the legislative idea above referred to, of unrestricted competition between rail lines and water routes, a proviso was prescribed where such water commerce was not routed through the Panama Canal, as follows:

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July 1, 1914.

Each of the applicants strongly urges that the boat line or lines in which it is interested is being operated within this proviso of the act, and quite an array of conditions now prevailing are advanced in support of this contention.

It is urged that the experience has been that the boat lines have been a losing proposition as a distinct operating unit, but that by reason of the financial strength of the owning railroad the boats have been kept in service, though operating at a loss, and that this condition could not or would not prevail if it were not for the joint ownership; that the boats would otherwise disappear from the lakes, and that thus keeping these boats in the service is "in the interest of the public and is of advantage to the convenience and commerce of the people."

Whether the poor financial statements presented by certain of the lake lines are due to inherent natural difficulties or the course of operation induced by the joint control, is a question

of considerable doubt on the records presented here. By reason of the particular accounting plan that has been followed, a material deficit is shown, whereas, according to the apparently more accurate system employed by the Commission's examiners of accounts, the same line, viz, the Mutual Transit Company, shows profitable operation. The explanation of the system employed made by the auditor of this line was that it was devised to avoid taxation of the profits that would otherwise have been shown. It also appeared as the opinion of an official of one of the lines that the condition was due to the fact that the differential between the lake-and-rail rate and the all-rail rate was too small to encourage a remunerative amount of traffic to move, and he intimated that if the joint control did not exist, the boat lines would lower their rates to a point where their bottoms would be filled.

It is urged, however, that though such independent operation might be more remunerative, it would necessarily become irregular and irresponsible, and that joint ownership has furnished the shipping public with a regular and uninterrupted service, which is admittedly of advantage to the convenience and commerce of the people. To render this regular service, it is said, the boats must move whether under light or full cargo, and experience indicates that the cargoes are light most of the time, entailing expensive operation, a policy of operation that can only be maintained under joint ownership.

The joint ownership and operation guarantees to the public the responsibility of the lake service, it is contended, to the same degree that the responsibility of the service of the owning railroad is assured.

It is urged that under the joint ownership and operation, a duplication of records and much work is obviated and many terminal expenses are reduced, all of which tend to more economical transportation and a lower cost for the lake haul, in the interest of the public and of advantage to the convenience and commerce of the people.

In further support of the contention, it is urged that the increased powers of this Commission under the act as it is now amended confer full jurisdiction to regulate and control the lake line situation, so that the railroads can not in the future so use the boat lines they own as to stifle competi-

tion on the great lakes. It is pointed out that this Commission may require the establishment of physical connections between the dock of the water carrier and the rails of any rail carrier or carriers subject to the act and prescribe the terms and conditions under which such construction is to be performed; that through routes and maximum joint rates may be established between and over rail and water lines, and that the Commission may determine the terms and conditions under which they shall be operated; that maximum rail proportional rates may be established and the traffic to which and the vessels to which same apply may be determined; that where there is an extension of the joint service as now operated, the rates, schedules, and practices of the water carriers will have to be filed with the Commission and be subject to the same supervision as that exercised over the railroads in this respect.

In passing on the question of whether or not the particular boat line is being operated within the proviso of the act it is necessary to first determine the purpose of the legislation which gave rise to these petitions. From an examination of the congressional debate from which the act emerged, it is at once clear that the spirit which undoubtedly prompted this legislation was a desire to preserve to the common interest of the people, free and unfettered, the "water roadbed" via the Panama Canal, which was nearing completion. Coupled as it is, the legislative purpose of the other parts of the amendment with respect to waters "elsewhere" must necessarily have been to restore all the water routes of the country to the same condition of freedom from any domination that would reduce their usefulness.

For any case to be within the spirit of this proviso it is necessary to show a situation in which are present all the elements which prevail, or would prevail, were the water service independently operated. On a watercourse where the boats and boat lines are free from domination or control by the railroads, and where they are left to survive as their merit or the ingenuity of their owners makes possible, there will be, and always is, a healthy rivalry and striving between such boat lines themselves and with paralleling railroads for all suitable and available traffic. There is competition. This

rivary manifests itself in several ways. The rates charged fluctuate according to economic principles, and the shipper enjoys invariably, as a result, lower charges for the transportation routed over such waterways and thereby reaps a return from the "nation's highway." Necessarily, coincident with the lowering of the rate, there is a rivalry in service which is an equally strong weapon of competition. The condition is one which results in the beneficial use of the waterways accruing to the shippers. As far as this legislation concerns water routes elsewhere than through the Panama Canal, the spirit and purpose of it is to restore to the people the beneficial use of the natural common highways.

The right to use the waterways of the country as a means of transportation is a natural right, but this right may not be abused to the injury of others, and it is the public right that the waters be so used as to return benefit to the people.

The waterways of the country furnish ready-made roadbeds for transportation routes, on which the rates for shipment may be made low because of this physical fact. But these arteries of commerce, without boats to ply on them, are useless for transportation purposes. And although there may be many boats plying on these water routes, they may be so operated as to produce practically the same condition of things as would exist were there no boats afloat.

As a natural and usual course of experience, where a railroad acquires and undertakes to operate a competing boat line, the rate for the water transportation ceases to be influenced solely by those ordinary conditions which affect such traffic, because a new element is introduced into the situation, namely, the interest of the owning railroad.

This discussion of general principles points the basis for the legislation here under consideration. If such is the basis, what is the purpose of the legislation, if it is not to relieve the watercourses of the country from the domination of the rail carriers?

Congress has decreed that there shall be a restoration of conditions which prevailed when railroads had no interest in and exercised no control over the boat lines plying the country's water routes. That the legislation might not be arbitrary but be effective within constitutional limitations, certain provisions were made so that in given instances which form

exceptions to the usual experiences in cases of joint ownership, such ownership may be continued. To comply with this legislative direction, however, it is necessary to divorce the railroads from their boat lines, unless the particular case comes within the exception as provided. If this is not the result, of what avail is this legislation?

The inquiry in these cases is, therefore, Is the joint operation of these boat lines such as to make of them an exception? Or, in the words of the statute, Is the service by water being operated in the interest of the public, and is it of advantage to the convenience and commerce of the people, and will an extension and a continuance thereof exclude, prevent, or reduce competition on the route by water under consideration?

The contentions of petitioners as to responsibility and regularity of this service under joint operation lose weight when it appears that there has been no lowering of the cost of water transportation accompanying them. It appears from correspondence passing between a boat-line manager and an official of the owning railroad, which forms a part of these records, that this manager attributes the small tonnage hauled by his line, and the consequent small revenues, to the fact that the differential between the lake-and-rail rates and the all-rail rates is too small. He urged a larger differential, assuring his superior that such a policy would enable him to profitably operate the boat line.

Instead of lower rates in prospect, it is made to appear that it is only the greater financial strength of the owning railroads that enables the present boats to operate, as it is contended that certain boat lines are being operated at a loss. If this be true, then there is no prospect for lower rates under continued joint ownership, and the public is reaping little benefit from this waterway, and the situation is almost the same and will be the same as if no waterway existed. If the people are not to enjoy a low charge for transportation on their waterways, the regularity or responsibility of the service is of questionable merit, since it seems that the shipping public is paying for it, as the rates via water and rail are approximately as high as the rates all rail.

No doubt, under joint operation, certain economies can be effected, but these economies have not manifested themselves in a reduced lake-and-rail transportation cost to the

public. Instead of any reduction in lake-and-rail rates they have been steadily advanced under joint ownership. Beginning about 1900, when trunk line control over the lake lines was becoming perfected, the first-class lake-and-rail rate from New York to Chicago has been advanced by successive increases from 54 cents to 62 cents; the rates on the other classes have been correspondingly advanced. In 1910, according to statements in the records which were not controverted, the trunk line interests agreed that the lake-and-rail rates should actually be advanced to the all-rail basis, and thus wipe out the differential except on first class, which was to be advanced from 62 to 70 cents. This action was only thwarted by the refusal of a foreign railroad owning a lake line to acquiesce therein. These successive advances, as the records show, have had the effect not only of preventing an increase in lake line tonnage, but in diverting from the lake routes to the all-rail lines, part of the tonnage which formerly moved on the lakes. Furthermore, there is much in the records tending to show that the very purpose of these advances in lake-and-rail rates was to divert tonnage to the all-rail lines. As a direct result of this rate policy of the owning railroads, the lake boats have operated with small cargoes, athough their operating expense was almost as great as if they had been fully loaded. This has in turn resulted in a high operating cost to the lake lines per unit of freight. Does not this policy fully explain the lake line deficit? Again, do not such facts make clear that whatever economies might be realized by joint ownership are offset by the waste resulting from the unfair use of vessel tonnage in the interest of the owning railroads? The railroad control of these boat lines can not be said to be in the public interest when the policy of these railroads has been, by an artificial rate structure to deprive the public of the natural benefits that would flow from a free use of this waterway.

In deciding these cases, the Commission is required to judge as to whether or not these boat lines are being operated in the public interest under joint ownership, and then it must say whether the extension of this operation will result in reducing, preventing, or excluding competition on the route by water.

That the joint ownership and operation of these boat lines has resulted in no real benefit to the people and that the opera-

tion is not in the interest of the public or of advantage to the convenience and commerce of the people is established by the facts as above indicated, and a complete monopoly is exercised by the owning railroads over the lake line situation through the medium of the Lake Line Association.

The arguments that the increased powers of the Commission have remedied the situation are faulty, since it does not appear that this Commission has any special jurisdiction under this amendment to stop the operation of this Lake Line Association or to prevent the establishment of some other like arrangement later on. These arguments also lose weight in view of the fact that the increased jurisdiction of the Commission will be just as available in the control of the lake line situation hereafter under independent operation of the lake lines, as under a continued joint operation. The public will enjoy all the benefits contained in the amendment through the enlargement of the Commission's jurisdiction with respect to water transportation and at the same time, and in addition, there will accrue such benefits as will result when water rates and service are influenced by competition.

After the divorcement this Commission may still regulate just as fully as under joint control, the through rail-and-water rate, fixing a reasonable maximum. It may also fix the maximum rail proportional of such through rate. It may still require the physical connection between the dock of a water line and the rails of any and all carriers serving a port of interchange.

The records here show no instance where the boat lines owned by the different rail carriers have actively competed for traffic with one another or with the paralleling railroads under the regime of joint ownership and operation. Under independent operation each of the lines which is now owned and operated by a railroad, in order to survive, will become a competitor of every other boat line and of every paralleling railroad for all traffic which moves by the Great Lakes or which might move over that route, and the result of such operation will be reflected in the character of service furnished the public and in the rate charged therefor.

The boat lines operating on the Great Lakes in conjunction with the barge lines operating on the Erie Canal furnish a through water route from western lake ports to the eastern

seaboard. It is significant from the records in these cases that the through route arrangements and the interchange of traffic between lake lines and these canal barge lines have been terminated under the joint ownership of the lake lines, and the traffic has practically disappeared, to the injury of the boat lines and of the Erie Canal barge lines on eastbound traffic. It is contrary to the interests of the owning railroads operating from Buffalo east, for their boat lines to continue any through operating arrangement with these canal barge lines for the movement of eastbound traffic. There is no power in this Commission to require the establishment of a through route between these railroad-owned lake lines and barge lines operating the Erie Canal, but under divorcement the lake lines will be free to make arrangements for the through carriage of freight in connection with the Erie Canal barge lines, and it will be to their interest to do so. The interests of the shipping public will be conserved, and those of the boat lines will be bettered in this respect under divorcement.

These boat lines under the control of the petitioning railroads have been first a sword and then a shield. When these roads succeeded in gaining control of the boat lines which had been in competition with paralleling rails in which they were interested, and later effected their combination through the Lake Line Association, by which they were able to and did drive all independent boats from the through lake-and-rail transportation, they thereby destroyed the possibility of competition with their railroads other than such competition as they were of a mind to permit. Having disposed of real competition via the Lakes, these boats are now held as a shield against possible competition of new independents. Since it appears from the records that the railroads are able to operate their boat lines at a loss where there is now no competition from independent lines, it is manifest that they could and would operate at a further loss in a rate war against independents. The large financial resources of the owning railroads make it impossible for an independent to engage in a rate war with a boat line so financed.

From a consideration of all the circumstances and conditions disclosed by the respective records herein, the Commission is of opinion and finds that none of the several existing specified services by water herein concerned is being operated

in the interest of the public or is of advantage to the convenience or commerce of the people within the meaning of the Act, and that an extension and a continuance thereof will prevent, exclude and reduce competition on the Great Lakes. The application of each of the petitioners herein is therefore denied, effective December 1, 1915, An order will be entered accordingly.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of May, A. D. 1915.

LAKE LINE APPLICATIONS UNDER PANAMA CANAL ACT.

No. 6381.

PENNSYLVANIA RAILROAD COMPANY AND NORTHERN CENTRAL RAILWAY COMPANY (ERIE & WESTERN TRANSPORTATION COMPANY—ANCHOR LINE).

No. 6504.

LEHIGH VALLEY RAILROAD COMPANY (LEHIGH VALLEY TRANSPORTATION COMPANY; LAKE LINE ONLY).

No. 6570.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY (MUTUAL TRANSIT COMPANY).

No. 6573.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY (WESTERN TRANSIT COMPANY).

No. 6603.

RUTLAND RAILROAD COMPANY (RUTLAND TRANSIT COMPANY).

No. 6615.

ERIE RAILROAD COMPANY (ERIE RAILROAD LAKE LINE).

No. 6616.

ERIE RAILROAD COMPANY (MUTUAL TRANSIT COMPANY ONLY).

No. 6624.

GRAND TRUNK RAILWAY COMPANY OF CANADA (CANADA ATLANTIC TRANSIT COMPANY ONLY).

No. 6631.

LEHIGH VALLEY RAILROAD COMPANY (MUTUAL TRANSIT COMPANY).

No. 6765.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY (RUTLAND TRANSIT COMPANY).

No. 6874.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY (MUTUAL TRANSIT COMPANY).

It appearing, That the Pennsylvania Railroad Company, Northern Central Railway Company, Lehigh Valley Railroad Company, New York Central & Hudson River Railroad Company, Rutland Railroad Company, Erie Railroad Company, Grand Trunk Railway Company of Canada, and Delaware, Lackawanna & Western Railroad Company have separately filed applications under Section 5 of the Act to Regulate Commerce, as amended by Section 11 of the Panama Canal Act, seeking authority to continue their interest in, and to operate beyond July 1, 1914, certain boat lines operating on the Great Lakes, as described in the report of the Commission herein;

It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the applications of each of the petitioners in these proceedings be, and they are hereby, denied, effective December 1, 1915.

By the Commission:

GEORGE B. MCGINTY,
Secretary.

(Seal)

EXHIBIT "B."

INTERSTATE COMMERCE COMMISSION.

LAKE LINE APPLICATIONS UNDER PANAMA CANAL ACT.

No. 6504.

LEHIGH VALLEY RAILROAD COMPANY (LEHIGH VALLEY TRANSPORTATION COMPANY; LAKE LINE ONLY).

Submitted October 23, 1915. Decided December 13, 1915.

The petition above described does not request a rehearing on the evidence, but merely a reconsideration of the question whether a competitive relationship exists between the Lehigh Valley Railroad Company and the Lehigh Valley Transportation Company such as is contemplated by Section 5 of the Act as amended; *Held*, No reason appears tending to show that the previous findings of the Commission that the Lehigh Valley Railroad Company does or may compete with the Lehigh Valley Transportation Company within the meaning of Section 5 as amended was in error. Petition will be dismissed.

R. W. Barrett, for Lehigh Valley Railroad Company;
W. H. Chandler, for Boston Chamber of Commerce;
C. J. Austin, for New York Produce Exchange;
G. A. Schroeder, for Chamber of Commerce of Milwaukee;
F. E. Williamson, for Buffalo Chamber of Commerce;
J. S. Brown and J. C. Jeffery, for Chicago Board of Trade.

REPORT OF THE COMMISSION UPON REHEARING.

McCHORD, *Chairman*:

The Lehigh Valley Railroad Company, as owner of the entire capital stock of the Lehigh Valley Transportation Company, which operates six vessels on the Great Lakes, filed a petition for rehearing on September 18, 1915, requesting the Commission to reopen and reconsider the petitioner's application for permission to continue its lake line service after July 1, 1914. The Commission, in *Lake Line Applications*

under Panama Canal Act, 33 I. C. C., 700, had previously denied the original petition of this carrier under Section 5 as amended, such denial to be effective December 15, 1915. The subject matter of the present petition was set for argument on October 23, 1915, solely upon the question whether the Commission's order of May 7, 1915, in so far as it affected the Lehigh Valley Railroad Company, should be modified.

Subsequent to the filing of the petition by the railroad company petitions for permission to intervene were filed by the Milwaukee Chamber of Commerce and the Chicago Board of Trade. These parties were permitted to intervene.

While the petition requested a rehearing it was conceded by counsel for the railroad company at the argument that no reason had been suggested why the case should be reheard. The only issue raised was whether or not the Commission had erred in assuming jurisdiction to deny the application of the Lehigh Valley Railroad for permission to continue its lake service. In other words, the only question now before the Commission is whether or not the Lehigh Valley Railroad Company does, or may, compete with its lake line so as to bring it within the provision of Section 5 as amended. The petition of the railroad company was based upon two grounds: (1) That the Commission's finding of fact that competition does or may exist between the railroad company and its lake line was erroneous; and (2) that the Commission's interpretation of the word "competition," as used in Section 5 as amended, was, as a matter of law, unsound. It will be observed that these propositions, if true, would establish that the Commission had no jurisdiction over the Lehigh Valley Railroad lake service under Section 5 as amended.

In support of the petitioner's first contention it was urged that the Commission erred in finding that this carrier's participation in joint rates and through routes with railroad companies which parallel the Lehigh Valley Transportation Company tended to show competition between this carrier and its lake line, since joint rates and through routes may be prescribed by the Commission, and it is contrary to reason to assume that a relationship which the Commission itself could establish is sufficient to give the Commission jurisdiction to order a divorcement. It was further urged that the Commission erred in finding that the participation of the railroad com-

pany in fast freight lines which compete with the lake service tended to show competition, since these fast freight lines are said to be mere trade names employed for advertising purposes, and in fact imply no more than the existence of joint rates and through routes.

It will be manifest from a reading of the Commission's original opinion that the two considerations just noted were not deemed by the Commission in themselves to be conclusive evidence of competition. The participation of the railroad company in fast freight lines, joint rates, and through routes, which run parallel to through routes in which the lake line participates, were deemed significant as showing that in addition to the purely local traffic of the railroad and the lake line, as to which there could be no competition, these companies were largely interested in through traffic as to which there might be competition. The above circumstances, together with the large volume of evidence showing aggressive activities of the Trunk Line Association and the Lake Lines Association, to which the Lehigh Valley Railroad Company was a party, in developing and extending the traffic over the all-rail through routes at the expense of the lake-and-rail routes, including that in which the lake line participated, demonstrated that the possibility of competition for through traffic between the railroad company and its rail connections and the lake line was real and substantial—so real and substantial that the railroad company acting with other trunk lines, organized and maintained the Lake Lines Association, a chief function of which was the controlling of lake rates and service in such a manner as to advance the interests of the all-rail routes.

The second contention of the petitioner was that in spite of all the facts of record the Commission could not, as a matter of law, find that competition did or might exist between the petitioner and its lake line, because competition as a matter of law could not exist between two carriers unless one was "striving" for traffic which the other one was actively seeking and wished to secure, and that such a relationship could not exist between the petitioner and its lake line, since the latter was merely an extension of the former. The record discloses that the lake line has an annual deficit of about $100,000, which must be borne by the petitioner. Why the railroad company should be anxious to continue its interest in the lake line

in spite of this annual deficit is a question that immediately suggests itself. One of the officials of the railroad who should be familiar with all of its traffic and rate interests testified that he could not tell whether the lake line was a benefit or a burden to the railroad from a dollars and cents standpoint, but that one reason which he was certain led the railroad to maintain its interest in this lake line was to secure for the railroad a voice in the making of the all-rail rates from Chicago to the East.

This leads to the inquiry, What interest has the Lehigh Valley Railroad in the all-rail rates from Chicago to the East? Its chief interest obviously is in the amount of the division of the all-rail rate which it is able to exact from its rail connections. If the Lehigh Valley was wholly dependent on its rail connections they would be in a position to dictate the division it would receive. While the Lehigh Valley has a lake line, however, it has a voice in what the all-rail rate should be and, what is more important, it is in a position to demand large divisions of these rates. The record shows, as might be expected under such conditions, that on most of the eastbound traffic the Lehigh Valley Railroad divisions of the all-rail rate from Chicago to the East are larger than its division of the lake-and-rail rate for the same haul. Thus it has come about that the railroad gets more revenue out of the all-rail haul than out of the lake-and-rail haul on a particular shipment. Here, then, is a situation where the interest of the Lehigh Valley Railroad directly conflicts with the interest of the lake line. To the extent that the Lehigh Valley Railroad is induced by its division of the all-rail rates to divert traffic from the lake-and-rail to the all-rail route it is "striving" against the lake line which it owns.

That this conflict of interest between the railroad and the lake line as to through traffic is not academic, but, on the contrary, exerts a real influence on the traffic policy of the railroad is made clear by the record. A letter from one official of the railroad company to another in 1904 is in the record, wherein it was stated that in connection with the eastbound movement of flour from Chicago "the old question" was presented "whether it is better to allow this business to go via central traffic roads and go after them for a share of it or make arrangements at Buffalo which would bolster up our

lake line and concentrate freight there for shipment to the East." The official who wrote this letter testified that the situation from the standpoint of freight solicitation was the same today as in 1904. Thus it appears that the solicitation of eastbound traffic by the railroad is not done with an eye single to the interests of the lake line in the haul from Chicago to Buffalo, but is influenced by the interests of the central freight association roads which, with the aid of the Lehigh Valley Railroad, directly compete with the lake line.

The above considerations make clear that as to a large volume of through traffic eastbound the petitioner does or may "strive" in the interest of the all-rail routes for traffic which the lake line might otherwise secure. The facts referred to in the original report of the Commission tend to show a "striving" in another way by the railroad company in the interest of the all-rail route for westbound traffic from New York to Chicago which might otherwise move by the rail-and-lake route. The record discloses many other facts which, together with those referred to above, show competition within the definition of that word which was given by the Supreme Court in the *Union Pacific Case*, 226 U. S., at page 87.

The interveners at the argument did not address themselves to the issue raised by the petition of the railroad company. These interveners confined their remarks to a statement as to the hardship that might be imposed upon certain shippers if the lake line were divorced from the railroad company. Their statement reflected the uncertainty that attends a change effected by legislation. The views urged by the interveners have no bearing upon the question as to the proper interpretation and application of the act to the facts at hand.

After reviewing its previous findings and order in the light of the present proceeding no reason appears why the Commission should modify its order denying the application of the petitioner as to its lake line service. An order will be entered dismissing the petition for rehearing.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of December, A. D. 1915.

LAKE LINE APPLICATIONS UNDER PANAMA CANAL ACT.

No. 6504.

LEHIGH VALLEY RAILROAD COMPANY (LEHIGH VALLEY TRANSPORTATION COMPANY; LAKE LINE ONLY).

This proceeding coming on for further consideration upon the petition for rehearing filed by the Lehigh Valley Railroad Company, and the Commission having, on the date hereof, made and filed its report upon the matters and things involved in said petition for rehearing, which report is hereby referred to and made a part hereof:

It is ordered, That said petition for rehearing be, and it is hereby, dismissed.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(Seal)

OPINION.
Filed May 12, 1916.

Before BUFFINGTON, MCPHERSON and WOOLLEY, Circuit Judges.

MCPHERSON, *Cir. Judge*:

In form this suit in equity is brought against the United States alone, but the Interstate Commerce Commission (which has intervened and answered) is the real defendant. The controversy has been heard in the district court by the three circuit Judges under the provisions of the Act of October 22, 1913 (38 Stat. 220).

The questions for decision arise under the Act of August 24, 1912, known as the Panama Canal Act, and especially under Section 11, which amends Section 5 of the Interstate Commerce Act of 1887. The amendment makes it

"* * * unlawful for any railroad company or other

common carrier subject to the Act to Regulate Commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal *or elsewhere*, with which said railroad or other carrier aforesaid *does or may compete for traffic*, or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

But, in order that any railroad or other carrier aimed at by the section might have an opportunity to have the question determined whether its relation to the carrier by water was forbidden; and (in case that question should be determined against it), might have an opportunity also either to divorce itself from the carrier by water, or to take such other steps as might seem advisable; the section was not to go into effect until July 1, 1914. Meanwhile the Interstate Commerce Commission was to have the following powers:

"Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine the questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section, and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion, or the application of any shipper, institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final."

Still further, Congress was aware that certain situations then existing might fall within the letter of the statute, although they did not offend against the spirit; and the section therefore goes on to enlarge the power of the Commission by the following provision:

> "If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water, *other than through the Panama Canal*, is being operated in *the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce, competition on the route by water under consideration*, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July 1, 1914. In every case of such extension, the rates, schedules and practices, of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July 1, 1914, but for any reason not heard and disposed of before said date, may be considered and granted thereafter."

Upon the passage of this Act the Lehigh Valley Railroad Company was obliged to decide what course it should pursue. It is a Pennsylvania corporation and an interstate carrier; it owns or operates a rail line from Jersey City to Buffalo, and connects with other carriers. It is the sole stockholder in the Lehigh Valley Transportation Company, a New Jersey corporation which owns and operates a fleet of freight-carrying steamships on the Great Lakes, that interchange both eastbound and westbound freight with the railroad company at Buffalo. The railroad company has no interest, either by ownership, lease, or otherwise, in any rail line west of Buffalo, but by means of through routes and joint rates it has an interest in the freight that is carried over several lines be-

tween the East and Chicago, Milwaukee, and other western points. Its rail line and its water line do not parallel each other. Physically, one merely prolongs the other, but by means of through routes and joint rates some freight carried over one line reaches some of the markets entered by freight carried over the other. At once, the question was presented—Is this a situation forbidden by the Act of 1912? The railroad company believed that a negative answer should be given, but of course, it desired a decision by some tribunal of authority.

To obtain such a decision, two courses at least were open: First, to continue the operation of both lines, and take the risk of defending successfully when the United States should sue for the penalty imposed by the Act to Regulate Commerce.

But, as the penalty is $5000 a day, the risk was evidently excessive, and in the end the other course was adopted, namely, to apply to the Commission for a ruling. Indeed, the Commission itself had taken the initiative, for in February, 1913, it had sent out a circular to numerous carriers—to the plaintiff among the number—asking for information in reference to water lines, and in the following July the plaintiff had furnished the information requested. In December the Commission called attention to the fact, that it was empowered "to extend the time beyond July 1, 1914, during which a railroad or other common carrier may continue the operation of service by water, if such service is of advantage to the convenience and commerce of the people, and such extension will neither exclude, prevent, nor reduce, competition on the route by water under consideration"; adding, that it would expect every application for such extension to be filed with the Commission not later than March 1, 1914. Accordingly, on January 21, the plaintiff applied for a hearing on the question, whether competition, or the possibility of competition, existed between itself and its water line; and prayed the Commission to make an order that the Railroad Company might continue to operate the steamships of the transportation company afer July 1, 1914. Under this petition a hearing was had a few months later and evidence was taken—but what evidence, or how much, we do not know. Similar applications on behalf of other carriers were also heard, and on May 7, 1915, the Commission made a report and order upon the general subject of "Lake Line Applications under the Panama Canal Act." The full

report will be found in 33 I. C. C. R. 699, but the parts that bear upon the case of the plaintiff—either specially, or in common with the other carriers—are for convenience repeated here:

"These cases are before this Commission upon petitions filed in accordance with the provisions of Section 5 of the Act to Regulate Commerce, as amended by the Panama Canal Act of August 24, 1912. The petitioners are rail carriers owning or having an interest in one or more boat lines, with boats plying on Lakes Ontario, Erie, Huron, Michigan, and Superior, hereinafter referred to as the Great Lakes. There has been no order consolidating these cases, but they were heard together. Each case has been considered and decided upon its own record, but as all of the cases involve many points in common, they will be disposed of in one report."

* * * * * * * * * *

"The Lehigh Valley Transportation Company is owned by the Lehigh Valley Railroad Company and is in addition to this railroad's interest in the Mutual Transit Company Line. The only port served in common by the rails and the boats of this line is Buffalo, the port of interchange."

* * * * * * * * * *

"The first controlling question arising under these applications is whether or not, within the meaning of the Panama Canal amendment, there is or may be competition for traffic between the vessels operated and the railroad interested in them.

This question would be easily answered in the affirmative if the ports of call were served in common by the boats and by the paralleling rails of the owning railroad. The physical situation would itself establish the case. It appears, though, that no such case is made out on the records here presented, since no two ports of call are served in common by the boats, and the paralleling rails of the particular owning railroad entity."

* * * * * * * * * *

"It is urged that this does not establish a case within the meaning of the Act, and that the Act only applies to cases where there is competition, actual or potenial, between the boats and the rails actually operated by the

owning entity.. This position takes no account of the extremely broad language used, to define the character of inter-ownership which the Act was meant to reach:

'From and after the 1st day of July, 1914, it shall be unlawful for any railroad company or other common carrier subject to the Act to Regulate Commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.'

The unsoundness of the contention is at once manifest when it is seen how in every case the Act could be evaded by a reorganization incorporating the paralleling rails which reach the port of call into a railroad entity distinct from the entity owning the boats, with the real ownership, through stock control, remaining as before. The contention is faulty and is contrary to the spirit as well as the letter of the Act."

"The case presented by the applications of the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company requires a further consideration of the relation these roads bear toward the traffic hauled, or, rather, which might be hauled, by their boat lines. As before noted, the boat lines owned or in which these railroads have an interest, with the exception of the interchange port of Buffalo, serve no points in common with the rails of any part of the owning railroad system.

Each of these roads, however, is a party to through all-rail routes and joint rates to all the ports served by its boats with respect to westbound and eastbound traffic. All of the principal carriers in central freight association territory concur in these rates, including the lines

west of Buffalo, which form parts of systems controlled by the petitioning trunk line carriers. The concurrences in the Lehigh Valley rates are shown in Lehigh Valley R. R., I. C. C. B.-9000. The concurrences in the Delaware, Lackawanna & Western rates are shown in Delaware, Lackawanna & Western R. R., I. C. C. No. 9400. These carriers in common with all other trunk line roads make through passenger fares from points on their lines to all central freight association points, including ports served by their boats, in connection with all central freight association carriers who concur in C. L. Hunter's Trunk Line Tariff I. C. C. A-75; Joint Passenger Tariff No. 15. They are also members of the Lake Lines Association and are parties to certain fast freight line arrangements. The effect of such alliances on their boat lines indicates that these railroads are parties to arrangements which make them competitors of their boat lines.

The through all-rail routes and joint rates which these roads maintain with carriers connecting at their lake interchange ports for points beyond, including the ports served by their boats, are legitimate and necessary arrangements for the convenience and facility of their rail transportation.

These petitioners, in connection with all central freight association territory rail carriers, as shown by their concurrences, are the joint makers of tariffs publishing joint through rates for the all-rail transportation to and from the ports served by their boats. The only thing to indicate that the entire all-rail haul is not performed by their respective lines is the concurrence of their connections in these rates. Together with their connections they make a through line from the East to the lake ports over which both eastbound and westbound traffic moves all rail. They originate the westbound traffic and control its routing. The actual result of these arrangements is the same as if these petitioners owned the rails reaching these ports.

The all-rail connections of the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company, which participate in the through route west of Buffalo, are capable of delivering to these roads

at Buffalo many times the volume of eastbound tonnage that it would be possible for these roads to originate through the medium of their own boat lines and deliver to their rails at Buffalo. These petitioning roads, therefore, are very solicitous to promote and improve their relations with their western rail connections. Through route arrangements are reciprocal, since the entire movement of traffic is not in the one direction. So the most potent way in which these petitioning roads can encourage a routing of the eastbound traffic from these western rail connections over their rails is to route as much westbound traffic as possible over the particular connection or connections which are able to furnish the most eastbound traffic. The westbound traffic which is so routed is necessarily diverted from the boats of these petitioners. This sacrifice of the boat lines is small when compared to the gains made by these petitioning carriers in the interchanging of all-rail traffic. The eastbound all-rail traffic in almost every instance might just as well be turned over at Buffalo to one of the several rivals of the petitioners extending East. The striving or rivalry for this eastbound traffic causes these petitioners to divert westbound traffic from their boats, and when they do this they are competing with their boats within the meaning of the Act as amended.

That the existence of paralleling through all-rail routes to which joint through rates are applicable, in which the petitioning railroad participates, is a circumstance bringing any application under this amendment within its provisions, seems clear when the amendment is considered in its application to the railroad ownership of, or interest in, boats operating through the Panama Canal. Neither at the time the amendment became a law nor now is there any transcontinental rail line owned or operated by a single railroad or system of railroads in the United States. If, therefore, the participation of a petitioning railroad in such through routes arrangement does not constitute an arrangement by which it is possible for it to compete with its boats operating through the Panama Canal from and to common points, then this amendment, as applied to traffic through the Panama Canal, is of no effect.

The 'fast freight line' was the forerunner of the through route and had its origin in the lack of arrangements for the interchange of equipment. These fast freight lines acquired large numbers of freight cars and made arrangements with certain roads over which it was desired to establish a through service. This through service could be established by using several different combinations of roads, so there was the same rivalry and striving between these several roads to be members of the particular fast freight line as exists under through route arrangements. The through route established, their business then is to solicit through shipments of freight to move all rail over the 'line' that has been organized. To this end soliciting offices were established in many trade centers. The participation in these 'fast freight lines' entails the same sacrifice on the part of these petitioners' boat lines as was pointed out with respect to the through route arrangements. These roads are members of 'fast freight lines' which are still in existence, and in the nature of things the best interests of their boat lines are made subservient to the interests of their rails, which, of course, are of much greater importance.

The Lehigh Valley Railroad Company is a party to and has a proprietary interest in the Traders' Dispatch and the Lehigh Valley Wabash Dispatch, fast freight lines reaching Chicago and Milwaukee, ports served by boats of the Lehigh Valley Transportation Company. This petitioner in the year 1913 contributed $69,208.27, to cover its share toward the maintenance of the Traders' Dispatch."

* * * * * * * * * *

"The Lehigh Valley Railroad Company insists that if its participation in these fast freight lines and contributions to them is wrong and contrary to the law, it is ready and willing to make any changes that might be suggested by the Commission. While such a position is commendable, these cases are to be tried on facts, not promises for future performances, and under the amendment, the Commission is empowered only to pass on the facts of past and present conditions as presented."

"The Lake Lines Association is an 'understanding

organization,' which, while claiming not to be an organized agency, has held meetings, the records of which, as shown in the evidence presented in these cases, indicate that its function is to insure a 'proper' management of these lines, from the viewpoint of the railroads, which could not have been possible if their operation were unrestrained. The whole arrangement might be classed as a 'get-together movement', to which all the railroads here petitioning are parties. While these two petitioning roads which are here specifically under consideration may not directly compete with their boat lines over the rails of their systems, their membership and activity in this association or participation in any like understanding places them in a position inimical to the best interest of their boat lines. Placed in such an attitude these roads, through the agency of other roads with which they are 'partners,' become the competitors of their own boat line.

The lake lines in which the petitioners are interested have been shorn of the initial rate-making power. This power has been usurped by the trunk line association, of which the petitioners are members. The through rates controlled by this authority, in which the boat lines are merely concurring carriers, determine for the shipper which lake line must be used. The particular route is controlled by applying arbitrary switching charges at Buffalo, which compel the through lake-and-rail traffic to move via the predetermined lake line. The zones of territory to be served and those not to be served by the lake lines are also determined by this outside authority. This is accomplished by maintaining a scale of rates not subject to competition, that forces traffic by either all-rail or lake-and-rail routes, as desired by the trunk line association. The interests and concern of the trunk line association in fixing these different combinations of rates is simply the solidified interest of the several member railroads, whose individual interests have been above indicated.

What has been said with special reference to the petitioners Lehigh Valley Railroad Company and the Delaware, Lackawanna and Western Railroad Company applies with equal force to each of the other petitioners herein, since each is a party to through all-rail routes reach-

ing the several ports served by their boats, as well as a member of the Lake Line Association.

From a consideration of all the circumstances the Commission is of opinion, and finds, that each of the applicants here involved does or may compete for traffic with the lake line or lines in which it has an interest.

. In the present cases, however, which are not applications for the extension of a service operating through the Panama Canal, the finding that competition, actual or potential, exists does not *ipso facto*, require the separation of the petitioning railroads from the boat lines in which they are interested within the meaning of the Act.

In extending to all water commerce the legislative idea above referred to, of unrestricted competition between rail lines and water routes, a proviso was prescribed where such water commerce was not routed through the Panama Canal, as follows:

'If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July 1, 1914.'

Each of the applicants strongly urges that the boat line or lines in which it is interested is being operated within this proviso of the Act, and quite an array of conditions now prevailing are advanced in support of this contention.

It is urged that the experience has been that the boat lines have been a losing proposition as a distinct operating unit, but that by reason of the financial strength of the owning railroad the boats have been kept in service, though operating at a loss, and that this condition could not or would not prevail if it were not for the joint ownership; that the boats would otherwise disappear from the lakes, and that thus keeping these boats in the service is 'in the interest of the public and is of advantage to the convenience and commerce of the people.'

Whether the poor financial statements presented by certain of the lake lines are due to inherent natural difficulties or the course of operating induced by the joint control, is a question of considerable doubt on the records presented here. By reason of the particular accounting plan that has been followed, a material deficit is shown, whereas, according to the apparently more accurate system employed by the Commission's examiners of accounts, the same line, viz., The Mutual Transit Company, shows profitable operation. The explanation of the system employed made by the auditor of this line was that it was devised to avoid taxation of the profits that would otherwise have been shown. It also appeared as the opinion of an official of one of the lines that the condition was due to the fact that the differential between the lake-and-rail rate and the all-rail rate was too small to encourage a remunerative amount of traffic to move and he intimated that if the joint control did not exist, the boat lines would lower their rates to a point where their bottoms would be filled.

It is urged, however, that though such independent operation might be more remunerative, it would necessarily become irregular and irresponsible, and that joint ownership has furnished the shipping public with a regular and uninterrupted service, which is admittedly of advantage to the convenience and commerce of the people. To render this regular service it is said, the boats must move whether under light or full cargo, and experience indicates that the cargoes are light most of the time, entailing expensive operation, a policy of operation that can only be maintained under joint ownership.

The joint ownership and operation guarantees to the public the responsibility of the lake service, it is contended, to the same degree that the responsibility of the service of the owning railroad is assured.

It is urged that under the joint ownership and operation a duplication of records and much work is obviated and many terminals expenses are reduced, all of which tend to more economical transportation and a lower cost for the lake haul, in the interest of the public and of advantage to the convenience and commerce of the people.

In further support of the contention, it is urged that the increased powers of this Commission under the Act as it is now amended confer full jurisdiction to regulate and control the lake line situation, so that the railroads cannot in the future so use the boat lines they own as to stifle competition on the Great Lakes. It is pointed out that this Commission may require the establishment of physical connections between the dock of the water carrier and the rails of any rail carrier or carriers subject to the act and prescribe the terms and conditions under which such construction is to be performed; that through routes and maximum joint rates may be established between and over rail and water lines, and that the Commission may determine the terms and conditions under which they shall be operated; that maximum rail proportional rates may be established and the traffic to which and the vessels to which same apply may be determined; that where there is an extension of the joint service as now operated, the rates, schedules, and practices of the water carriers will have to be filed with the Commission and be subject to the same supervision as that exercised over the railroads in this respect.

In passing on the question of whether or not the particular boat line is being operated within the proviso of the Act it is necessary to first determine the purpose of the legislation which gave rise to the petitions. From an examination of the congressional debate from which the Act emerged, it is at once clear that the spirit which undoubtedly prompted this legislation was a desire to preserve to the common interest of the people, free and unfettered, the 'water roadbed' via the Panama Canal, which was nearing completion. Coupled as it is, the legislative purpose of the other part of the amendment with respect to waters 'elsewhere' must necessarily have been to restore all the water routes of the country to the same condition of freedom from any domination that would reduce their usefulness.

For any case to be within the spirit of this proviso it is necessary to show a situation in which are present all the elements which prevail, or would prevail, were the water service independently operated. On a water course

where the boats and boat lines are free from domination or control by the railroads, and where they are left to survive as their merit or their ingenuity of their owners makes possible, there will be, and always is, a healthy rivalry and striving between such boat lines themselves and with paralleling railroads for all suitable and available traffic. There is competition. This rivalry manifests itself in several ways. The rates charged fluctuate according to economic principles, and the shipper enjoys invariably, as a result, lower charges for the transportation routed over such waterways and thereby reaps a return from the 'nation's highway.' Necessarily, coincident with the lowering of the rates, there is a rivalry in service which is an equally strong weapon of competition. The condition is one which results in the beneficial use of the waterways accruing to the shippers. As far as this legislation concerns water routes elsewhere than through the Panama Canal, the spirit and purpose of it is to restore to the people the beneficial use of the natural common highways.

The right to use the waterways of the country as a means of transportation is a natural right, but this right may not be abused to the injury of others, and it is the public right that the waters be so used as to return benefit to the people.

The waterways of the country furnish ready-made roadbeds for transportation routes, on which the rates for shipment may be made low because of this physical fact. But these arteries of commerce, without boats to ply on them are useless for transportation purposes. And although there may be many boats plying on these water routes, they may be so operated as to produce practically the same condition of things as would exist were there no boats afloat.

As a natural and usual course of experience, where a railroad acquires and undertakes to operate a competing boat line, the rate for the water transportation ceases to be influenced solely by those ordinary conditions which affect such traffic, because a new element is introduced into the situation, namely, the interest of the owning railroad.

This discussion of general principles points the basis

for the legislation here under consideration. If such is the basis, what is the purpose of the legislation, if it is not to relieve the water courses of the country from the domination of the rail carriers?

Congress has decreed that there shall be a restoration of conditions which prevailed when railroads had no interest in and exercised no control over the boat lines plying the country's water routes. That the legislation might not be arbitrary, but be effective within constitutional limitations, certain provisions were made so that in given instances which form exceptions to the usual experiences in cases of joint ownership, such ownership may be continued. To comply with this legislative direction, however, it is necessary to divorce the railroads from their boat lines, unless the particular case comes within the exception as provided. If this is not the result, of what avail is this legislation?

The inquiry in these cases is, therefore, Is the joint operation of these boat lines such as to make of them an exception? Or, in the words of the statute, Is the service by water being operated in the interest of the public, and is it of advantage to the convenience and commerce of the people, and will an extension and a continuance thereof exclude, prevent. or reduce competition on the route by water under consideration?

The contentions of petitioners as to responsibility and regularity of this service under joint operation lose weight when it appears that there has been no lowering of the cost of water transportation accompanying them. It appears from correspondence passing between a boat-line manager and an official of the owning railroad, which forms a part of these records, that this manager attributes the small tonnage hauled by his line, and the consequent small revenues, to the fact that the differential between the lake-and-rail rates and the all-rail rates is too small. He urged a larger differential, assuring his superior that such a policy would enable him to profitably operate the boat line.

Instead of lower rates in prospect, it is made to appear that it is only the greater financial strength of the owning railroads that enables the present boats to oper-

ate as it is contended that certain boat lines are being operated at a loss. If this be true, then there is no prospect for lower rates under continued joint ownership, and the public is reaping little benefit from this waterway, and the situation is almost the same and will be the same as if no waterway existed.

No doubt, under joint operation, certain economies can be effected, but these economies have not manifested themselves in a reduced lake-and-rail transportation cost to the public. Instead of any reduction in lake-and-rail rates they have been steadily advanced under joint ownership. Beginning about 1900, when trunk line control over the lake lines was becoming perfected, the first-class lake-and-rail rate from New York to Chicago has been advanced by successive increases from 54 cents to 62 cents; the rates on the other classes have been correspondingly advanced. In 1910, according to statements in the records which were not controverted, the trunk line interests agreed that the lake-and-rail rates should actually be advanced to the all-rail basis, thus wipe out the differential except on first class, which was to be advanced from 62 to 70 cents. This action was only thwarted by the refusal of a foreign railroad owning a lake line to acquiesce therein. These successive advances, as the records show, have had the effect not only of preventing an increase in lake line tonnage, but in diverting from the lake routes to the all-rail lines part of the tonnage which formerly moved on the lakes. Furthermore, there is much in the records tending to show that the very purpose of these advances in lake-and-rail rates was to divert tonnage to the all-rail lines. As a direct result of this rate policy of the owning railroads. the lake boats have operated with small cargoes, although their operating expenses was almost as great as if they had been fully loaded. This has in turn resulted in a high operating cost to the lake lines per unit of freight. Does not this policy fully explain the lake line deficit? Again, do not such facts make clear that whatever economies might be realized by joint ownership are offset by the waste resulting from the unfair use of vessel tonnage in the interests of the owning railroads? The railroad control of these boat lines cannot be said to be in

the public interest when the policy of these railroads has been, by an artificial rate structure to deprive the public of the natural benefits that would flow from a free use of this waterway.

In deciding these cases, the Commission is required to judge as to whether or not these boat lines are being operated in the public interest under joint ownership, and then it must say whether the continuance of this operation will result in reducing, preventing, or excluding competition on the route by water.

That the joint ownership and operation of these boat lines has resulted in no real benefit to the people and that the operation is not in the interest of the public or of advantage to the convenience and commerce of the people is established by the facts as above indicated, and a complete monopoly is exercised by the owning railroads over the lake line situation through the medium of the Lake Line Association.

The arguments that the increased powers of the Commission have remedied the situation are faulty, since it does not appear that this Commission has any special jurisdiction under this amendment to stop the operation of this Lake Line Association or to prevent the establishment of some other like arrangement later on. These arguments also lose weight in view of the fact that the increased jurisdiction of the Commission will be just as available in the control of the lake line situation hereafter under independent operation of the lake lines, as under a continued joint operation. The public will enjoy all the benefits contained in the amendment through the enlargement of the Commission's jurisdiction with respect to water transportation and at the same time and in addition there will accrue such benefits as will result when water rates and service are influenced by competition.

After divorcement this Commission may still regulate just as fully as under joint control, and through rail-and-water rate, fixing a reasonable maximum. It may also fix the maximum rail proportional of such through rate. It may still require the physical connection between the dock of a water line and the rails of any and all carriers serving a port of interchange.

The records here show no instances where the boat lines owned by the different rail carriers have actively competed for traffic with one another or with the paralleling railroads under the regime of joint ownership and operation. Under independent operation each of the lines which is now owned and operated by a railroad, in order to survive, will become a competitor of every other boat line and of every paralleling railroad for all traffic which moves by the Great Lakes or which might move over that route and the result of such operation will be reflected in the character of the service furnished the public and in the rate charged therefor.

The boat lines operating on the Great Lakes in conjunction with the barge lines operating on the Erie Canal furnish a through water route from the western lake ports to the eastern seaboard. It is significant from the records in these cases that the through route arrangements and the interchange of traffic between lake lines and these canal barge lines have been terminated under the joint ownership of the lake lines, and the traffic has practically disappeared, to the injury of the boat lines and the Erie Canal barge lines on eastbound traffic. It is contrary to the interests of the owning railroads operating from Buffalo east, for their boat lines to continue any through operating arrangement with these canal barge lines for the movement of eastbound traffic. There is no power in this Commission to require the establishment of a through route between these railroad owned lake lines and barge lines operating the Erie Canal, but under the divorcement the lake lines will be free to make arrangements for the through carriage of freight in connection with the Erie Canal barge lines, and it will be to their interest to do so. The interests of the shipping public will be conserved, and those of the boat lines will be bettered in this respect under divorcement.

These boat lines under the control of the petitioning railroads have been first a sword and then a shield. When these roads succeeded in gaining control of the boat lines which had been in competition with paralleling rails in which they were interested, and later effected their combination through the Lake Line Association, by which they

were able to and did drive all independent boats from the through lake-and-rail transportation, they thereby destroyed the possibility of competition with their railroads other than such competition as they were of a mind to permit. Having disposed of real competition via the lakes, these boats are now held as a shield against possible competition of new independents. Since it appears from the records that the railroads are able to operate their boat lines at a loss where there is now no competition from independent lines, it is manifest that they could and would operate at a further loss in a rate war against independents. The large financial resources of the owning railroads make it impossible for an independent to engage in a rate war with a boat line so financed.

From a consideration of all the circumstances and conditions disclosed by the respective records herein, the Commission is of the opinion and finds that none of the several existing specified services by water herein concerned is being operated in the interest of the public or is of advantage to the convenience or commerce of the people within the meaning of the Act, and that an extension and a continuance thereof will prevent, exclude, and reduce competition on the Great Lakes. The application of each of the petitioners herein is therefore denied, effective December 1, 1915. An order will be entered accordingly."

The order of May 7 made the report of the Commission a part thereof, and denied the plaintiff's application, but postponed the effectiveness of the order until December 1, 1915, (afterwards extended to December 15). The railroad company was dissatisfied with the result, and on September 17 applied for a rehearing. This was granted and in October the rehearing was had. On December 13 the Commission made another report (37 I. C. C. R. 77), which follows *in extenso*:

"The Lehigh Valley Railroad Company, as owner of the entire capital stock of the Lehigh Valley Transportation Company, which operates six vessels on the Great Lakes, filed a petition for rehearing on September 18, 1915, requesting the Commission to reopen and reconsider the petitioner's application for permission to con-

tinue its lake line service after July 1, 1914. The Commission, in Lake Line Applications under Panama Canal Act, 33 I. C. C., 700, had previously denied the original petition of this carrier under Section 5 as amended, such denial to be effective December 15, 1915. The subject matter of the present petition was set for argument on October 23, 1915, solely upon the question whether the Commission's order of May 7, 1915, in so far as it affected the Lehigh Valley Railroad Company, should be modified.

Subsequent to the filing of the petition by the railroad company petitions for permission to intervene were filed by the Milwaukee Chamber of Commerce and the Chicago Board of Trade. These parties were permitted to intervene.

While the petition requested a rehearing it was conceded by counsel for the railroad company at the argument that no reason had been suggested why the case should be reheard. The only issue raised was whether or not the Commission had erred in assuming jurisdiction to deny the application of the Lehigh Valley Railroad for permission to continue its lake service. In other words, the only question now before the Commission is whether or not the Lehigh Valley Railroad Company does, or may, compete with its lake line so as to bring it within the provision of Section 5 as amended. The petition of the railroad company was based upon two grounds: (1) That the Commission's finding of fact that competition does or may exist between the railroad company and its lake line was erroneous; and (2) that the Commission's interpretation of the word 'competition' as used in Section 5 as amended was, as a matter of law, unsound. It will be observed that these propositions, if true, would establish that the Commission had no jurisdiction over the Lehigh Valley Railroad lake service under Section 5 as amended.

In support of the petitioner's first contention it was urged that the Commission erred in finding that the carrier's participation in joint rates and through routes with railroad companies which parallel the Lehigh Valley Transportation Company tended to show competition between this carrier and its lake line, since joint rates and through routes may be prescribed by the Commission, and

it is contrary to reason to assume that a relationship which the Commission itself could establish is sufficient to give the Commission jurisdiction to order a divorcement. It was further urged that the Commission erred in finding that the participation of the railroad company in fast freight lines which compete with the lake service tended to show competition, since these fast freight lines are said to be mere trade names employed for advertising purposes, and in fact imply no more than the existence of joint rates and through routes.

It will be manifest from a reading of the Commission's original opinion that the two considerations just noted were not deemed by the Commission in themselves to be conclusive evidence of competition. The participation of the railroad company in fast freight lines, joint rates and through routes, which run parallel to through routes in which the lake line participates, were deemed significant as showing that in addition to the purely local traffic of the railroad and the lake line, as to which there could be no competition, these companies were largely interested in through traffic as to which there might be competition. The above circumstances, together with the large volume of evidence showing aggressive activities of the Trunk Line Association and the Lake Line Association, in which the Lehigh Valley Railroad Company was a party, in developing and extending the traffic over the all-rail through routes at the expense of the lake-and-rail routes, including that in which the lake line participated, demonstrated that the possibility of competition for through traffic between the railroad company and its rail connections and the lake line was real and substantial—so real and substantial that the railroad company acting with other trunk lines organized and maintained Lake Line Association, a chief function of which was the controlling of lake rates and service in such a manner as to advance the interest of the all-rail routes.

The second contention of the petitioner was that in spite of all the facts of record the Commission could not, as a matter of law, find that competition did or might exist between the petitioner and its lake lines, because competition as a matter of law could not exist between two car-

riers unless one was 'striving' for traffic which the other one was actively seeking and wished to secure, and that such a relationship could not exist between the petitioner and its lake line, since the latter was merely an extension of the former. The record discloses that the lake line has an annual deficit of about $100,000, which must be borne by the petitioner. Why the railroad company should be anxious to continue its interest in the lake line in spite of this annual deficit is a question that immediately suggested itself. One of the officials of the railroad who should be familiar with all of its traffic and rate interest testified that he could not tell whether the lake line was a benefit or a burden to the railroad from a dollars and cents standpoint, but that one reason which he was certain led the railroad to maintain its interest in this lake line was to secure for the railroad a voice in the making of the all-rail rates from Chicago to the East.

This leads to the inquiry, What interest has the Lehigh Valley Railroad in the all-rail rates from Chicago to the East? Its chief interest obviously is in the amount of the division of the all-rail rate which it is able to exact from its rail connections. If the Lehigh Valley was wholly dependent on its rail connections they would be in a position to dictate the division it would receive. While the Lehigh Valley has a lake line, however, it has a voice in what the all-rail rate should be and, what is more important, it is in a position to demand large divisions of these rates. The record shows, as might be expected under such condition, that on most of the eastbound traffic the Lehigh Valley Railroad divisions of the all-rail rate from Chicago to the East are larger than its division of the lake-and-rail rate for the same haul. Thus it has come about that the Railroad gets more revenue out of the all-rail haul than out of the lake-and-rail haul on a particular shipment. Here, then, is a situation where the interest of the Lehigh Valley Railroad directly conflicts with the interest of the lake line. To the extent that the Lehigh Valley Railroad is induced by its division of the all-rail rates to divert traffic from the lake-and-rail to the all-rail route it is 'striving' against the lake line which it owns.

That this conflict of interest between the railroad and

the lake line as to through traffic is not academic, but on the contrary, exerts a real influence on the traffic policy of the railroad is made clear by the record. A letter from one official of the railroad company to another in 1904 is in the record, wherein it was stated that in connection with the eastbound movement of flour from Chicago 'the old question' was presented 'whether it is better to allow this business to go via central traffic roads and go after them for a share of it, or make arrangements at Buffalo which would bolster up our lake line and concentrate freight there for shipment to the East.' The official who wrote this letter testified that the situation from the standpoint of freight solicitation was the same today as in 1904. Thus it appears that the solicitation of eastbound traffic by the railroad is not done with an eye single to the interests of the lake line in the haul from Chicago to Buffalo, but is influenced by the interests of the central freight association roads, which, with the aid of the Lehigh Valley Railroad, directly compete with the lake line.

The above considerations make clear that as to a large volume of through traffic eastbound the petitioner does or may 'strive' in the interest of the all-rail routes for the traffic which the lake lines might otherwise secure. The facts referred to in the original report of the Commission tend to show a 'striving' in another way by the railroad company in the interest of the all-rail route for westbound traffic from New York to Chicago, which might otherwise move by the rail-and-lake route. The record discloses many other facts which, together with those referred to above, show competition within the definition of that word which was given by the Supreme Court in the Union Pacific Case, 226 U. S., at page 87.

The interveners at the argument did not address themselves to the issue raised by the petition of the railroad company. These interveners confined their remarks to a statement as to the hardship that might be imposed upon certain shippers if the lake line were divorced from the railroad company. Their statement reflected the uncertainty that attends a change effected by the legislation. The views urged by the interveners have no bearing upon the question as to the proper interpretation and application of the Act to the facts at hand.

> After reviewing its previous findings and order in the light of the present proceeding no reason appears why the Commission should modify its order denying the application of the petitioner as to its lake line service. An order will be entered dismissing the petition for rehearing."

Accordingly, an order was filed on December 13, making the report just quoted a part thereof and dismissing the petition for a rehearing. Being still dissatisfied, the railroad company, (having tried and failed in the previous September to induce the Department of Justice to agree to a test case in the courts), renewed the effort, ran one of its boats on December 16 from Chicago to Buffalo, and again asked the Department to bring suit for the penalty, so that the question might be decided by the federal tribunals. After some correspondence this effort also came to nothing, and the result was that the bill now before us was filed.

After a full recital of the foregoing facts, the bill prays for service on the respondent (the United States), on the Attorney General, and on the Interstate Commerce Commission, and asks that the United States and the Commission "be perpetually enjoined and restrained by a decree and injunction of this Court from enforcing the said order of the Interstate Commerce Commission of May 7, 1915, and from taking any steps or instituting any proceedings for the enforcement thereof." A preliminary injunction "to the same purpose, tenor, and effect" was also asked for, and was granted as a matter of form, in order to preserve the *status quo*. Shortly afterwards a final hearing was had, but no evidence was offered except the two reports of the Commission.

Upon the foregoing facts we are of opinion that for either of two reasons the injunction prayed for should not be granted.

(1) We have serious doubt whether injunction is an appropriate remedy in the present situation. We think it important to observe precisely what Congress has done. Essentially, the Act ordains that after July 1, 1914, common interest of a certain kind between two classes of carriers shall be unlawful, but it does not declare how such common interest shall come to an end. The only express sanction to be found in the Act is a penalty for each day's violation of the statutory com-

mand. A method of procedure is provided by which the Commission may determine whether a carrier does or does not fall within the class of offenders; if it does not so fall, of course, the Act does not forbid the relation; but, even if it does so fall, the Commission still has the power to suspend the operation of the Act, if certain specified conditions are found to exist. If the conditions do not exist, the offending carrier is left exposed to the statutory penalties; the Commission is not directed and apparently has no power (unless the power be implied) to take affirmative action toward dissolution. The plaintiff seems to suppose that the Commission has authority to order an offending carrier to divorce itself from the carrier by water; and, indeed, it seems to suppose also that the order of May 9, 1915, is at least the equivalent of such a command. We do not so understand the situation. Whatever advice on this subject the Commission may have seen proper to give, either expressly or by implication, what the Commission has actually done is merely to refuse to act; it has declined to suspend the operation of the statute in the plaintiff's favor. No order of divorcement or any other affirmative command has been issued; the order complained of is purely negative, and nothing else is before us.

We are not considering the power of the United States to interfere directly by asking a court of equity to decree that the relation between two carriers should be dissolved; we confine the discussion to the questions that we understand to be presented—the power, and the action, of the Commission. If a federal court had authority to issue a mandamus to the Commission directing it to suspend the operation of the Act in a case that might seem sufficient to the court, such a proceeding might furnish a remedy under which the plaintiff could raise the questions it desires us to consider. But Congress has added no such power to the limited jurisdiction of the federal courts, and we think none can be exercised. Section 11 of the Canal Act must be left just where Congress chose to leave it, namely, with a declaration of what conduct is to be unlawful after a specified date, and with the sanction of a penalty large enough to make the declaration effective. In substance, Congress has said to an offending carrier: "Here is a rule of conduct for your guidance. If you choose to continue a relation that has thus been declared unlawful, although the Commis-

sion does not take any direct action to dissolve the connection, we shall make that connection so expensive to maintain that you will be glad to dissolve it of your own motion." And, as the Commission has kept strictly within the power conferred by Congress, and is not threatening to overstep the mark, we are much in doubt whether any ground exists upon which the injunction asked for can be based.

(2) But, if we should be mistaken in this view and if an injunction should issue in a proper case, we are further of the opinion that no such case has been made out by the record before us. No evidence was offered except the two reports quoted above, and as Section 11 makes the order of the Commission final, and as that order embraces the finding, that the plaintiff "does or may compete for traffic with the lake line or lines in which it has an interest," this would seem to be an end of the controversy. The plaintiff, however, attacks the "jurisdiction" of the Commission to make such a finding or order, and (as we understand the argument) supports the position by contending that no competition is possible under the physical conditions that confessedly prevail, and therefore that the order is arbitrary and completely disregards the evidence. But this is not an attack on the Commission's "jurisdiction"; its right to judge depends on the statute, and the statute in terms gives it the right to inquire and determine whether a given situation presents a case of actual or potential competition. This is precisely what the plaintiff asked, and what the Commission undertook, namely, an inquiry whether the railroad competed actually or potentially with its own fleet of boats; and we entertain no doubt that the jurisdiction existed, and that it was directed to a proper object. In what manner the Commission may have exercised this right is, of course, a different question. Its findings are made final, and final they must remain, but with one qualification—certain fundamental rules must have been obeyed. In spite of the statutory declaration of finality, the court still retain a limited power of supervision—enough to see that constitutional requirements have been observed: Intermountain Rate Cases, 234 U. S. 490; U. S. v. R. R., 235 U. S. 320. There must have been a hearing, with the essentials involved in that word, and the action of the Commission must not have been arbitrary;

but in other respects we have no right to review what has been done, or the manner of doing it. We cannot substitute our judgment for the judgment of the Commission on the weight or the effect of the evidence, or correct mistakes that may have entered into the findings of fact.

Now the finding, that the plaintiff does or may compete for traffic with its boat line, is the finding of an ultimate fact, exactly as the finding of discrimination was decided to be in Meeker vs. Railroad Co. (236 U. S. 427); and the only question that remains is whether such a finding was made without evidence, or by disregarding the evidence plainly and arbitrarily. In view of the full reports of the Commission the subject need not be discussed. It is clear to us that the Commission had before it other relevant evidence than the fact that the plaintiff's boat line did not parallel its rail line, but that physically one was merely a prolongation of the other. The real question was, what effect the traffic over one line had, or might have, upon the traffic over the other. Or, in other words,—Was the amount of money received from freight carried by one line affected, or likely to be affected, by the amount of money received from a similar source by the other line? Upon this point there was relevant evidence before the Commission, and its finding is conclusive.

3. In conclusion, a few words may be said concerning the constitutionality of Section 11. The plaintiff's argument does not attack the power of Congress to enact that competing carriers must be free from control by a common interest; and concedes the power to authorize the Commission to decide whether competition exists, either actual or potential. The contention is, that Congress has gone too far in the third paragraph of Section 11, which empowers the Commission to permit the operation of an "existing specified service by water" beyond July 1, 1914. The paragraph is perhaps somewhat lacking in clearness and precision:

> "If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce com-

petition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen."

But, taken in connection with the earlier paragraphs, we think the fair construction is, that, even if the Commission shall find that competition, or the possibility of competition, now exists between a particular carrier by land and a carrier by water under common control, the service by water may still be continued if the Commission shall be of opinion that the convenience and commerce of the people will be promoted thereby, and "that such extension will neither exclude, prevent, nor reduce, competition on the route by water under consideration."

In other words, having found that the two carriers actually compete, or may compete, the Commission may nevertheless permit the common control to continue and may allow the land carrier to continue the service by water, if the public interest will be promoted thereby, and if continuance of the common control does not injure the existing, or the potential, competition. The plaintiff objects to these provisions on the ground that Congress should have enacted a standard to which the Commission should conform in determining these questions, and contends that no such standard has been ordained and that the whole subject has been turned over to the arbitrary action of the Commission. We do not agree with the argument; in our opinion Congress has done all that was reasonably necessary. In the earlier paragraphs of the section, a standard is set up—actual or potential competition—but of necessity Congress was obliged to leave the Commission to decide whether the varying facts of varying situations did or did not conform thereto. The statute declares what rule of decision shall be applied to every case; but, as the precise facts of every situation could not possibly be known, the Commission was of necessity empowered to ascertain them. As already stated, this part of the section is not attacked, and in view of several well-known decisions of the Supreme Court it could not be successfully attacked as unconstitutional. It is no more a delegation of legislative power than is the delega-

tion of power to decide whether a rate is "reasonable" or a practice is "discriminating."

And for similar reasons we think the objections to the paragraph now in question must also fail. No legislative body can deal in detail with all the complex relations of modern commerce. In most instances, all that can be done is to state principles and lay down general rules, entrusting the proper tribunals with the task of applying them. Congress evidently saw that in exceptional situations the convenience and the commerce of the people might profit from an existing service by water, although a carrier by land might be controlling its operation. This is the first inquiry, and it presents a question of fact. And the second inquiry is also of fact. If the common control and operation be continued, will competition over the route by water be excluded, prevented, or reduced? The facts once ascertained, the rule laid down by Congress is to be applied—namely, unless the public interest will be served, and unless competition will be maintained, common control is forbidden; but, if the public interest will be promoted, and if competition will not suffer, common control may continue. In our opinion these provisions were indispensable, and indeed unavoidable.

The lawmaking power laid down as definite a rule as it could, and merely entrusted the Commission with authority to ascertain the facts. The Commission did not ordain the rule, but merely applies it. Indeed, the plaintiff seems to overlook this aspect of the statute. In sweeping terms, *all* forms of joint control are forbidden to the carriers described, but the paragraph now attacked allows the Commission to suspend the prohibition in a certain class of cases. This is a favor granted to the carriers in exceptional cases, and is not the invasion of a right. If they had a right to be invaded, it was the right of common control; but this (it is conceded) was lawfully taken away, and the carrier can hardly criticise the terms on which the sovereign sees fit to restore it as a matter of grace.

A decree may be entered dismissing the bill.

DECREE.
Filed August 26, 1916.

And now, August 22, 1916, the above case having come on to be argued upon final hearing upon bill, answer and proofs, it is upon due consideration

Ordered, adjudged and decreed, upon application of the plaintiff (and the defendants not objecting):

1. That the bill of complaint herein be and the same is hereby dismissed.

2. To the end, however, that the existing status may be maintained, pending an appeal to the Supreme Court of the United States,

It is further ordered, adjudged and decreed, that the injunction which was heretofore granted in this case be and is hereby restored and continued in force for the term of thirty days, and if in the meantime an appeal shall be taken to the Supreme Court of the United States, the said injunction shall be and hereby is continued in force until the said appeal is heard and determined in the said Supreme Court of the United States.

3. That the said Lehigh Valley Railroad Company is adjudged and directed to pay the costs of this proceeding.

By the Court:

JOHN B. MCPHERSON,
Circuit Judge.

ASSIGNMENTS OF ERROR.
Filed Sept. 8, 1916.

And now, on this sixth day of September, 1916, comes the petitioner by its solicitors, R. W. Barrett, E. H. Boles and John G. Johnson, and says that the decree entered in the above entitled cause on the 22nd day of August, 1916, is erroneous and unjust to petitioner, and assigns for errors:

1. That the learned Court erred in denying the restraining order heretofore applied for.

2. That the learned Court erred in holding that the Commission's finding that the plaintiff does or may compete for traffic with its boat line is the finding of an ultimate fact not subject to judicial review.

3. That the learned Court erred in holding that the order of the Commission is negative in effect and is not equivalent to a positive command imposing positive duties on the complainant.

4. That the learned Court erred in holding that injunction is not the appropriate and proper remedy in this proceeding.

5. That the learned Court erred in holding that it does not have power to enjoin the enforcement of the order of the Commission.

6. That the learned Court erred in finding that the Commission had jurisdiction to issue the order complained of.

7. That the learned Court erred in not holding that the Commission's findings of fact are in themselves sufficient to show that the Commission was without jurisdiction to make the order complained of.

8. That the learned Court erred in not finding that the facts found by the Commission show that as a matter of law the Act does not apply to the plaintiff and its boat line.

9. That the learned Court erred in not finding that all of the facts found by the Commission show that the Commission misinterpreted the word "competition" found in the Act and was without jurisdiction to make the order complained of.

10. That the learned Court erred in not holding that the order of the Commission was beyond the limits of the power delegated to the Commission by the Acts of Congress.

11. That the learned Court erred in holding that the eleventh section of the Act of Congress of August 24th, 1912, is constitutional.

12. That the learned Court erred in not granting the relief prayed for.

Wherefore the petitioner prays that the said decree be reversed and that the District Court be instructed to enter a decree enjoining, setting aside and annulling the order of the Interstate Commerce Commission complained of, and that the said District Court be instructed to grant the petitioner a permanent injunction restraining the enforcement of the said orders of the Interstate Commerce Commission.

R. W. BARRETT,
E. H. BOLES,
JOHN G. JOHNSON,
Solicitors for Complainant.

STIPULATION.
Filed Sept. 23, 1916.

W. W. Craig, Esq.,
Clerk of said Court.
Sir:

Whereas, The above case has been appealed to the Supreme Court of the United States,

And Whereas, the proofs in said case are small in volume and cannot be effectively abbreviated or condensed so as to materially shorten the record; therefore,

It is hereby stipulated and agreed by and between counsel for the parties hereto, as follows:

1. That the transcript of the record on appeal in the above case shall consist of:

Docket Entries,
Bill of Complaint,
Motion for Preliminary Injunction,
Order of Court upon Motion for Preliminary Injunction,
Decree sur Motion for Preliminary Injunction,
Answers, and Motion of United States to Dismiss,

Evidence, the same to include only the two opinions and orders of the Interstate Commerce Commission in Docket 6504 entitled Lehigh Valley Railroad Company (Lehigh Valley Transportation Company; Lake Line only) at pages 699 to 716, inclusive, of Volume 33 of the Reports of the Interstate

Commission, and the record of the said Commission in the same Docket and proceeding found at pages 77 to 81, inclusive, of Volume 37 of the records of said Commission.

Opinion of Court on Final Hearing.
Decree.
Assignments of Error.

2. And counsel for the respective parties hereby request that an order be entered by the Court permitting the said reports of the Interstate Commerce Commission to be incorporated in the transcript, as above stipulated.

R. W. BARRETT,
E. H. BOLES,
JOHN G. JOHNSON,
Solicitors for Complainant.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

JOSEPH W. FOLK,
Solicitor for Interstate Commerce Commission, Intervenor.

ORDER.

And now, to wit, this 21st day of September, 1916, it is ordered that the two reports of the Interstate Commerce Commission, with the orders of the said Commission attached thereto, may be included in the transcript of appeal in this case without abridgement, in accordance with the foregoing stipulation and request of counsel.

JOHN B. MCPHERSON, *J.*

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNNSYLVANIA, } *sct.*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the Pleas and Proceedings in the case of Lehigh Valley Railroad Company vs. United States of America and Interstate Commerce Commission (Intervenor), No. 1521, December Sessions, 1915, as per stipulation of counsel filed, the transcript of record is to include, a copy of which is hereto attached, and now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 5th day of October, in the year of our Lord one thousand, nine hundred and sixteen, and in the one hundred and forty-first year of the Independence of the United States.

(Seal)

WILLIAM W. CRAIG,
Clerk District Court, U. S.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

December Session, 1915.

No. 1521.

LEHIGH VALLEY RAILROAD COMPANY, Complainant,
vs.
UNITED STATES OF AMERICA, Respondent,
and
INTERSTATE COMMERCE COMMISSION, Intervenor.

(*Petition for Appeal and Order. Filed September* 8, 1916.)

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The above named complainant, Lehigh Valley Railroad Company conce-ving itself aggrieved by the decree made and entered in the above case on or about August 22nd, 1916, does hereby appeal from said decree to the Supreme Court of the United States, for the reason specified in the assignments *or* error which are filed herewith, and prays that this appeal may be allowed and that a citation may issue as authorized by law commanding the above named respondent to appear in the Supreme Court of the United States and show cause, if any there be, why the said decree should not be corrected and that a transcript of the record, papers and exhibits upon which said decree was made, duly authenticated be forwarded to said Supreme Court of the United States.

LEHIGH VALLEY RAILROAD COMPANY,
By R. W. BARRETT,
E. H. BOLES,
JOHN G. JOHNSON,
Solicitors for Complainant.

And now, to wit: this 8th day of Sept. 1916, the foregoing petition for an appeal is granted and it is Ordered and Decreed that a citation issue as prayed for therein.

JOHN B. McPHERSON, *Cir. J.*

In the Supreme Court of the United States,

OCTOBER TERM, 1916.

LEHIGH VALLEY RAILROAD COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA, APPELLEE,

INTERSTATE COMMERCE COMMISSION, INTERVENER.

No. 733.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION BY THE LEHIGH VALLEY RAILROAD COMPANY TO ADVANCE.

The Lehigh Valley Railroad Company, appellant, by its counsel, now comes, and in accordance with the provisions of Section 2 of the Act of June 16, 1910, 36 Stat. 542, and the Urgent Deficiency Act of October 22, 1913, 38 Stat. 208, 220, respectfully moves the court to advance the above entitled case for hearing on a day convenient to the court.

This is a proceeding in equity by the Lehigh Valley Railroad Company to enjoin the United States and the

Interstate Commerce Commission from enforcing the order of the Interstate Commerce Commission entered in proceedings under section 11 of the Act of Congress of August 24, 1912, known as the "Panama Canal Act", which amends section 5 of the Act to Regulate Commerce of February 4, 1887.

The Lehigh Valley Railroad Company is the owner of the entire capital stock, except qualifying shares, of the Lehigh Valley Transportation Company, a corporation of the State of New Jersey, which operates a lake line on the Great Lakes, between Buffalo, New York, on the east, and Chicago, Illinois, and Milwaukee, Wisconsin, on the west.

The order of the Commission which it was sought to enjoin is that dismissing the petition of the Railroad Company, filed in accordance with the provisions of the Panama Canal Act, asking the permission of the Commission to continue the railroad operation of the Lehigh Valley Transportation Company's line of steamers on the Great Lakes.

The report of the Commission and the order dismissing the Railroad Company's application and refusing permission to continue the operation of its lake line under railroad ownership is found in Volume 33 of the Commission's reports, at pages 699 to 716.

The Railroad Company filed a bill in the District Court of the United States for the Eastern District of Pennsylvania asking that the United States and the Interstate Commerce Commission be permanently enjoined from enforcing the order of the Commission and

from interfering with the appellant in the operation of its Lake Line. The District Court granted a temporary restraining order, and after the hearing and argument upon the bill for a permanent injunction dismissed the bill but continued the temporary injunction pending the decision of the Supreme Court on appeal.

The Railroad Company is operating its Lake Line at the present time under the temporary injunction granted by the District Court.

The early determination of the appeal in this case is of great public importance as it involves the discontinuance of a transportation system which has been operated on the Great Lakes for over thirty years, connecting the western terminus of the Lehigh Valley Railroad at Buffalo, New York, with Chicago and Milwaukee on Lake Michigan.

The Solicitor General and the Chief Counsel for the Interstate Commerce Commission concur in the request that the case be advanced.

JOHN G. JOHNSON,
EDGAR H. BOLES,
R. W. BARRETT,
Solicitors for Lehigh Valley Railroad Company.

December, 1916.

Office Supreme Court, U. S.
FILED
FEB 9 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

No. 788.

OCTOBER TERM, 1916.

LEHIGH VALLEY RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

(INTERSTATE COMMERCE COMMISSION,
Intervenor.)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLANT.

RICHARD W. BARRETT,
Attorney for Appellant.

JOHN G. JOHNSON,
EDGAR H. BOLES,
Of Counsel.

The Evening Post Job Printing Office, Inc., 140 Fulton St., N. Y.

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IN THE

Supreme Court of the United States.

LEHIGH VALLEY RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

(INTERSTATE COMMERCE COMMISSION,
Intervenor.)

No. 733.
October Term,
1916.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

I. Statement of the Case.

This is an appeal from the decree of the United States District Court for the Eastern District of Pennsylvania, dismissing the Appellant's bill praying for an injunction against the United States and the Interstate Commerce Commission.

The prayer of the Appellant's petition was for a permanent injunction against the enforcement of

the order of the Interstate Commerce Commission, entered May 7th, 1915, prohibiting the Appellant from continuing in the ownership of the capital stock of its steamship line, the Lehigh Valley Transportation Company, operating on the Great Lakes, between Buffalo, New York, on the east, and Chicago, Illinois, and Milwaukee, Wisconsin, on the west.

The proceedings before the Commission and the District Court involved the interpretation of the amendment of August 24th, 1912, known as the Panama Canal Act, to Section 5 of the Act to Regulate Commerce. The particular paragraphs of the Panama Canal Act in question were those prohibiting, under certain circumstances, the ownership and operation by railroads of steamship lines through the Panama Canal and elsewhere and granting to the Interstate Commerce Commission jurisdiction, within the limits defined by the Act, to determine whether railroad ownership of water lines, other than through the Panama Canal, might continue.

The Commission found, in two opinions, upon hearing and upon a petition for re-hearing, that the Lehigh Valley Railroad Company could not own and operate a line of steamships on the Great Lakes. The proceedings before the District Court were based entirely upon the determinations of fact and the orders of the Commission. None of the evidence offered before the Commission was submitted to the Court. The District Court (three Circuit Judges sitting) dismissed the Appellant's bill and allowed this appeal from the order of dismissal.

Two questions are presented by the record: (1) Whether the Commission, upon its own determinations of fact, was, under the Act, empowered to enter its order prohibiting the Appellant from owning and operating its Lake Line? (2) If the Commission was not so empowered, is injunction the proper remedy?

The Appellant, the Lehigh Valley Railroad Company, a corporation organized under the laws of the Commonwealth of Pennsylvania, owns and operates a line of railroad, *inter alia*, between Jersey City, New Jersey, and Buffalo, New York. The Lehigh Valley Railroad Company in the Spring of 1881 began to operate steamboats on the Great Lakes and has ever since that time continued in its operation of a lake line. For several years it has operated its line of steamboats on the Great Lakes through the stock ownership of the Lehigh Valley Transportation Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having a capital stock of $1,500,000. The Appellant owns all of the capital stock of the Lehigh Valley Transportation Company. The Transportation Company owns at the present time six steel steam vessels which operate between Buffalo, N. Y., the western terminus of the Railroad, and Chicago, Ill., and Milwaukee, Wis., on Lake Michigan. This was the practical situation at the time of the passage of the Panama Canal Act and the initiation of these proceedings.

The Act under which these proceedings were instituted and which is in question before this Court, was passed by Congress on August 24, 1912,

and was a part of or a "rider" to the Panama Canal Act. The particular paragraphs of this act act affecting railroad-owned water lines in general were enacted by Congress as an amendment to Section 5 of the Interstate Commerce Act. This amendment, insofar as it affects the present litigation, may be divided into two parts, as follows:

(*a*) Provisions in reference to the presence of actual or potential competition between a water carrier and its rail owner:

> "From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any Railroad Company or other common carrier subject to the act to regulate commerce to own, lease, operate, control or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly through any holding company or by stockholders or directors in common or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic, or any vessel carrying freight or passengers upon said water route or elsewhere; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offence.
>
> "Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation

of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final."

(*b*) Provision empowering the Commission to allow the continuance of railroad ownership and operation of boat or water lines, even though there be actual or potential competition between them:

"If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people and that such extension will neither exclude, prevent nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments

> thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation."

The first subdivision of the Act, quoted above, is the vital one in the case before the Court. The Act prohibits railroads from owning or operating a water carrier with which the rail owner "does or may compete for traffic" and "questions of fact as to the competition or possibility of competition" are to be determined by the Commission. This Act provides that a penalty of $5,000 per day shall be imposed upon any person or corporation for its violation and designates the Interstate Commerce Commission as the body empowered to determine the questions of fact and to issue such orders as would indicate to petitioning carriers, or to carriers which did not petition the Commission, whether they could continue in the ownership and operation of steamships.

The Appellant, pursuant to a circular of the Interstate Commerce Commission, dated December 2, 1913, filed a petition with the Commission praying that an order be issued to the end that the six steel steam vessels of the Lehigh Valley Transportation Company might continue to be operated under the stock ownership of the Railroad Company, after July 1, 1914. A hearing on the Appellant's petition was held before the Commission beginning on May 12, 1914, and continued for several days thereafter. The Commission issued its report and order in reference thereto on May 7, 1915, and in the said report the Commission found that the Appellant did or

might compete with the Lehigh Valley Transportation Company, the stock of which is owned by it, and denied the Railroad Company's application to be allowed to continue in the ownership and operation of its Lake Line. The report and order of the Commission are found in Volume 33 of the reports thereof, at pages 699 to 716, inclusive. The Commission's order included a number of applications for the continuation of water service on the Great Lakes by rail carriers owning or interested in such service, and was as follows:

> "It appearing, That the Pennsylvania Railroad Company, Northern Central Railway Company, *Lehigh Valley Railroad Company*, New York Central & Hudson River Railroad Company, Rutland Railroad Company, Erie Railroad Company, Grand Trunk Railway Company of Canada, and Delaware, Lackawanna & Western Railroad Company have separately filed applications under section 5 of the act to regulate commerce as amended by section 11 of the Panama Canal Act, seeking authority to continue their interest in, and to operate beyond July 1, 1914, certain boat lines operating on the great lakes, as described in the report of the Commission herein:
>
> "It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a report thereof:
>
> "It is ordered, That the Applications of each of the petitioners in these proceedings

be, and they are hereby, denied, effective December 1, 1915.

"By the Commission.

GEORGE B. MCGINTY,
(SEAL) Secretary."

The effective date of the said order, viz., December 1, 1915, was later extended by the Commission to December 15, 1915.

The Appellant filed a petition with the Commission for a rehearing, which the Commission dismissed on December 13, 1915, and affirmed its opinion and order of May 7, 1915. The bill for an injunction was filed with the District Court upon this final action by the Commission. The Appellant operated its Lake Line during the period of navigation for 1916 under a temporary injunction granted by the District Court, the bill for a permanent injunction having been dismissed.

II. Specifications of Error.

The Appellant submits that the decree is erroneous in the following respects:

(1) The facts determined by the Commission in its opinion clearly indicate that the Appellant does not and cannot within the provisions of the Act, "compete" with its Lake Line. The prayer of the bill should therefore have been granted.

(2) The facts which the act requires the Commission to determine and which the Commission did determine and set out in its

opinions show in themselves that as a matter of law the Commission was, under the act, without power to deny the Appellant the privilege of continuing in the ownership and operation of its Lake Line and the Court should have so found and should have allowed the Appellant's prayer for injunction against the enforcement of the order of the Commission.

(3) The order of the Commission denying the prayer of the Appellant although negative in form is positive in effect and injunction is the proper remedy.

III. Argument.

Congress did not empower the Commission to deny the Lehigh Valley Railroad the privilege of owning and operating a boat line between the extreme western terminus of the Railroad at Buffalo, N. Y., and Chicago, Ill., and Milwaukee, Wis., for the reason that the Railroad does not and cannot compete. within the terms of the Act, with such a boat line.

(1) The evil sought to be remedied by the Panama Canal Act and the purpose of Congress as enacted into the Act.

The question squarely before the Court is whether the Panama Canal Act applies to such a relationship as that existing between the Lehigh

Valley Railroad and its Lake Line operating on the Great Lakes. If the Railroad "does or may compete" with its Lake Line the order of the Commission prohibiting the continued ownership and operation of its Lake Line by the Railroad and the decree of the Court were within the jurisdiction of the Commission and should be sustained. It is respectfully submitted that both the Commission and the Court wholly misconstrued the meaning of "Competition", both as expressed in the act itself and as indicated by the history of the evil Congress sought to remedy by the passage of the Act. To determine the exact meaning of the act is not without difficulty and as an aid in this respect it is necessary to consider the evil sought to be remedied. Much authority for recourse to the history of the passage of an act and an analysis of the evil to be remedied, as guides to the meaning of a statute, is found in the reports of the Supreme Court. Mr. Justice Brewer said, in *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, at page 463:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body" (citing *U. S.* v. *Union Pacific R. R.*, 91 U. S. 72, 79).

The Panama Canal Act amending Section 5 of the Act to Regulate Commerce was passed August 24, 1912. It is a part of the act providing for the government of the Canal Zone and

the operation of the Canal then nearing completion. The opposition of some of the railroads of the country to the construction of the canal is historical. When the canal neared completion and Congress took up the question of the regulation of its operation a bill was introduced providing that no railroad-owned vessels could use the canal, the fear being expressed that such use would interfere with private enterprise in operating steamship lines from coast to coast through this waterway. It soon developed that an absolute prohibition of all railroad-owned boats from the canal might cause international complications and work injustice to certain railroads in the United States. Congress then undertook to prohibit absolutely from the Canal railroad-owned steamships " with which said railroad does or may compete for traffic." This act was introduced March 15, 1912 (H. R. 21969, 62nd Congress, 2nd Session). The act applied not only to the Panama Canal but to the other waterways of the United States, including the Great Lakes. The evil to be remedied was the injurious effect Congress thought the operation of railroad-owned boats upon the waterways of the country had upon private enterprise upon these waterways when the railroad-owned boats did or could compete with the lines of their rail owners.

It is respectfully submitted that Congress never intended that the amendment to the Panama Canal Act be so interpreted that it would apply to railroads owning boat lines which are extensions or feeders of the rail line. This was not considered as an evil to be remedied by the act.

The following sentence from the report of the House Committee on the first bill introduced providing for the divorcement of water lines from their rail owners, shows in clear language what the evil was which the members of the Committee of the House having charge of the bill intended to be remedied by the act:

> " In answering demands for the exclusion of railroad-owned ships from the canal, which, in this bill, or any other, would simply amount to an amendment to the act to regulate commerce, the Committee thinks it wise, just and opportune to broaden the amendment so as to serve the higher, wider, more pressing and more necessary purpose of *excluding the railroads from operating vessels in competition with their tracks anywhere, in the coastwise trade generally, or in the lakes and rivers.*"* (See Congressional Record, Mch. 16, 1912, p. 3584.)

We are also furnished, for the purpose of assisting in determining the purpose of Congress in the passage of this act and the nature of the evil to be dealt with, material assistance from a speech by Representative Adamson, Chairman of the House Committee on Interstate Commerce. The debate in the House, both for and against the amendment to the Panama Canal Act, outlined above, was carried on largely by Mr. Adamson, of Alabama, Chairman of the House Committee on Interstate Commerce, speaking for the Committee in favor of the bill, and by Mr. Malby, of New York, leader of the opposition, against the bill. The following extracts from the debate (see

*Italics ours here and elsewhere in this brief.

Congressional Record, May 18, 1912, p. 6929) emphasizes the statement of the purpose of the legislation as viewed by its most ardent opponents and supporters. Mr. Malby said:

> "I would like to know on what theory the Committee proceeds to deny to a railroad company, as a part of its general system, necessary for the running of the railroad itself, a right to own a shipping line which is an extension or a feeder upon which the railroad itself absolutely, in many cases, depends for its transportation of freight. Why should you deny to them any ownership over that line, any more than you would deny to the railroad a right to extend its rails across to the very market where the ship goes?"

Mr. Adamson answered as follows:

> "I answer the gentleman by denying his premise absolutely. No railroad has any right to run a ship line to the exclusion of real competition through the watercourses that ought to be competitive with itself. It is not true that railroads have built up water ways. Naturally ships were the original means of transportation, and the railroads have, through manipulation of capital, managed of late years to drive ships off of the watercourses along their own lines and put their own ships on them. *I have no objection to their running ships, where, as the gentleman says, they are feeders, to gather up and distribute business. That is all right.* But when they propose to get possession of that watercourse that runs parallel to the railroad and take the business and raise the rates by excluding other ships prevents that and kills

> competition, and that course of action will be prevented some time, if it is not done in this bill."

It is to be noted that Mr. Adamson said:

> "I have no objection to their (the railroads) running ships where, as the gentleman says, they are feeders, to gather up and distribute business. That is all right."

Mr. Adamson said further that when the railroads "propose to get possession of that water course that runs parallel to the railroad and take the business", such a course of action would be prevented, if not in this bill, at some time in some other bill. It is, therefore, with this background of Congressional reports and debates that the provision in Section 5 of the Act to Regulate Commerce, against the continued ownership by railroads of water lines where there was competition or the possibility of competition between the two, was passed by Congress.

Chairman Adamson did not even confine the meaning of the act to boat lines that parallel the rail lines of their owners; he did not even consider this an evil unless the paralleling rail line was guilty of certain acts, which he definitely outlined in his speech, those acts being,—taking the business of the boat line, raising the rates by excluding other ships, and killing competition. The Lehigh Valley Railroad does not even come within the physical situation described by Mr. Adamson. It does not even parallel for any distance whatsoever its boat line. It, therefore, cannot be considered at all as having been covered by any of

the remarks made by Chairman Adamson. Chairman Adamson not only placed his interpretation of the act in a positive manner, but he also stated it negatively. He said that the proponents of the bill did not seek to interfere with water lines which were extensions of or feeders for rail lines. Thus the situation was placed before Congress and resulted in the passage of the act now before the court for construction.

It is respectfully submitted that the Interstate Commerce Commission wholly misconceived the evil Congress intended to remedy by the Panama Canal Act. The Commission assumed that ownership of a water line by a railroad was decreed by Congress to be an evil and that Congress intended to separate every water line from its rail owner. The Commission thus expressed its idea of the purpose of Congress in this respect (Record, pp. 68 and 69):

> From an examination of the congressional debate from which the act emerged, it is at once clear that the spirit which undoubtedly prompted this legislation was a desire to preserve to the common interest of the people, free and unfettered, the "water roadbed" via the Panama Canal, which was nearing completion. Coupled as it is, the legislative purpose of the other parts of the amendment with respect to waters "elsewhere" must necessarily have been to restore all the water routes of the country to the same condition of freedom from any domination that would reduce their usefulness.
>
> * * * * *
>
> As far as this legislation concerns water routes elsewhere than through the Panama

> Canal, the spirit and purpose of it is to restore to the people the beneficial use of the natural common highways.
>
> * * * * *
>
> Congress has decreed that there shall be a restoration of conditions which prevailed when railroads had no interest in and exercised no control over the boat lines plying the country's water routes. That the legislation might not be arbitrary but be effective within constitutional limitations, certain provisions were made so that in giving instances which form exceptions to the usual experiences in cases of joint ownership, such ownership may be continued. To comply with this legislative direction, however, it is necessary to divorce the railroads from their boat lines, unless the particular case comes within the exception as provided. If this is not the result, of what avail is this legislation?

It is thus clear that the Commission misconceived the evil Congress sought to remedy and broadened the application of the act to include not only rail lines which did or could compete with water lines owned by them but also all rail lines owning water lines, irrespective of the element of competition.

(2) The facts determined by the Commission and upon which the Appellant was denied the privilege of continuing in the ownership and operation of its Lake Line.

(a) *The Record before the Court.*

The evidence taken before the Commission in this case is not before the Court and the Court is

not requested to pass upon any question of fact involved in the case. The question before the Court is whether the facts determined by the Commission do not as a matter of law under the terms of the act deprive the Commission of jurisdiction to issue its order preventing the Appellant from owning and operating its boat line.

All of the "facts" are before the Court for the Commission is required by the Act

> "*to determine questions of fact as to the competition or possibility of competition*, after full hearing, on the application of any railroad company or other carrier".

This is the "jurisdiction" of the Commission. It is required by section 14 of the Act (34 Stat. 589) to make a report in writing showing its "conclusions". Section 14 is as follows in this respect:

> "Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises."

By the terms of the Panama Canal Act which is before the Court the conclusions of the Commission are determinations of "questions of fact as to competition or the possibility of competition" between the Lehigh Valley Railroad and its Lake Line. It must therefore be assumed that the reports of the Commission upon which its order in this case is based contain all its

" determinations of fact ". Only " determinations of fact " in this case actually made by the Commission can be brought before this Court, and it is respectfully submitted that the printing of the evidence taken in the case would give the Court no additional light as to any " determinations of fact " made by the Commission but not contained in the Commission's reports.

The lower Court seemed to think that it was being asked to review questions of fact which are not subject to judicial review. The Court said in this respect (Record, p. 106):

> " There must have been a hearing, with the essentials involved in that word, and the action of the Commission must not have been arbitrary; but in other respects we have no right to review what has been done, or the manner of doing it. We cannot substitute our judgment for the judgment of the Commission on the weight or the effect of the evidence, or correct mistakes that may have entered into the findings of fact."

It is respectfully submitted that the Court was not asked to correct mistakes in findings of fact or consider the weight of evidence. The Commission was required by the Act to determine questions of fact as to competition. There is no reason to think that Congress did not mean just what it said. Congress knew that if the Commission could hear evidence and then report only its conclusions that there was or was not competition, petitioning carriers would have no means of knowing the basis of the Commission's decision. Congress therefore was not content to permit the

Commission to register only its "conclusions" in writing under Section 14 of the Act to Regulate Commerce, but specifically provided that the Commission must "determine the questions of fact" as to competition or the possibility thereof. Petitioners were to know what the Commission determined. They were not to be deprived of their property upon indefinite allusions to "the evidence in the case",—questions of fact were to be "*determined*". The Commission fully recognized its obligations in respect of its determinations of fact and thus referred to its findings in its order in this case (see Record, p. 75):

> "It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission on the date hereof, has made and filed a report *containing its findings of fact and conclusions thereon* which said report is hereby referred to and made a part hereof."

This Court is not requested to review these facts or to weigh any evidence, but it is requested to find that they do not *in law under the Act* justify the order of the Commission denying the petition of the Appellant to continue in the ownership and operation of its Lake Line.

(b) *Outline of the "questions of fact" in respect of the competition or possibility of competition between the Lehigh Valley Railroad and its Lake Line, determined by the Commission and upon which its order was based.*

The Commission made two separate determinations of questions of fact in this proceeding,

both of which are a part of the record in the case. The first was made on May 7, 1915 (Lake Line Applications under Panama Canal Act, 33 I. C. C., pp. 699 to 716, inclusive, Record, p. 54). The second was made on December 13, 1915, upon the application of the Appellant for a rehearing (Lehigh Valley Railroad Company (Lehigh Valley Transportation Company; Lake Line only), 37 I. C. C., pp. 77 to 80, inclusive, Record, p. 76).

The following are the determinations of fact found by the Commission:

(1) Physical relationship between Lehigh Valley Railroad and its Lake Line.

The Commission determined that the Lehigh Valley Railroad's western terminus was at Buffalo, N. Y., and that at this point it connected with its Lake Line, which operated on the Great Lakes between the railroad terminus at Buffalo, and Chicago, Ill., and Milwaukee, Wis. The specific finding is as follows (Record, p. 57):

> "The Lehigh Valley Transportation Company is owned by the Lehigh Valley Railroad Company and is in addition to this railroad's interest in the Mutual Transit Company Line. *The only port served in common by the rails and the boats of this line is Buffalo, the point of interchange.*"

(Also Record, p. 61.)

> "The case presented by the application of the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company requires a further considera-

tion of the relation these roads bear toward the traffic hauled, or, rather, which might be hauled, by their boat lines. As before noted, the boat lines owned or in which these railroads have an interest, with the exception of the interchange port of Buffalo, *serve no points in common with the rails of any part of the owning railroad system.*"

(See also Map Record, p. 59.)

The first question of fact determined by the Commission is that the Lehigh Valley Railroad and the Lake Line it owns connect at Buffalo, N. Y., and form a continuous Rail and Water line between New York City on the East and Chicago and Milwaukee on the West; that the two serve *no points in common* and that the railroad can perform no transportation service that the Lake Line could by any possibility perform. The Commission, after finding that neither of these two transportation agencies could perform any act or service that the other could perform, proceeded to determine other facts in reference to these two companies, which, in the opinion of the Commission, were relative to competition or the possibility of competition. It was upon the determination of these facts that the Commission gave itself jurisdiction over the Appellant. The facts thus determined are as follows:

(2) Through routes and joint rates with other rail lines.

The Commission found that the Lehigh Valley Railroad Company has through routes and joint rates from points on its line to Central Freight

Association territory, including points served by its boats. In other words, the Commission found that the Lehigh Valley Railroad Company, operating between New York and Buffalo, has through routes and joint rates with the Michigan Central Railroad Company and the Lake Shore Railroad Company, from Buffalo westward to Chicago; that the Lehigh Valley Railroad Company's boat line parallels the Michigan Central Railroad Company and the Lake Shore Railroad Company, between Buffalo, N. Y., and Chicago, Ill.

The Commission's findings in reference to through routes and joint rates are as follows:

> " Each of these roads (the Lehigh Valley and the Delaware, Lackawanna and Western), however, is a party to through all-rail routes and joint rates to all the ports served by its boats with respect to westbound and eastbound traffic. All of the principal carriers in central freight association territory concur in these rates, including the lines west of Buffalo, which form parts of systems controlled by the petitioning trunk line carriers. The concurrences in the Lehigh Valley rates are shown in Lehigh Valley R. R. I. C. C. B-9000. The concurrences in the Delaware, Lackawanna & Western rates are shown in Delaware, Lackawanna & Western R. R. I. C. C. No. 9400. These carriers in common with all other trunk line roads make through passenger fares from points on their lines to all central freight association points, including ports served by their boats, in connection with all central freight association carriers who concur in C. L. Hunter's Trunk Line Tariff I. C. C. A–75; Joint Passenger Tariff No. 15. They are also members of the Lake

Lines Association and are parties to certain fast freight line arrangements. The effect of such alliances on their boat lines indicates that these railroads are parties to arrangements which make them competitors of their boat lines.

The through all-rail routes and joint rates which these routes maintain with carriers connecting at their lake interchange ports for points beyond, including the ports served by their boats, are legitimate and necessary arrangements for the convenience and facility of their rail transportation.

These petitioners, in connection with all central freight association territory rail carriers, as shown by their concurrences, are the joint makers of tariffs publishing joint through rates for the all-rail transportation to and from the ports served by their boats. The only thing to indicate that the entire all-rail haul is not performed by the respective lines is the concurrence of their connections in these rates. Together with their connections they make a through line from the east to the lake ports over which both eastbound and westbound traffic moves all-rail. They originate the westbound traffic and control its routing (33 I. C. C., pp. 706 and 707; Record, pp. 61 and 62).

* * * * *

It will be manifest from a reading of the Commission's original opinion that the two considerations just noted (Through Routes and Joint Rates and Fast Freight Lines) were not deemed by the Commission in themselves to be conclusive evidence of competition. The participation of the railroad company in fast freight lines, joint rates and through routes, which run parallel to through routes in which the lake line participates, were

deemed significant as showing that in addition to the purely local traffic of the railroad and the lake line, as to which there could be no competition, these companies were largely interested in through traffic as to which there might be competition. The above circumstances, together with the large volume of evidence showing aggressive activities of the Trunk Line Association and the Lake Lines Association, to which the Lehigh Valley Railroad Company was a party, in developing and extending the traffic over the all-rail through routes at the expense of the lake-and-rail routes, including that in which the lake line participated, demonstrated that the possibility of competition for through traffic between the railroad company and its rail connections and the lake line was real and substantial—so real and substantial that the railroad company acting with other trunk lines organized and maintained the Lake Lines Association, a chief function of which was the controlling of lake rates and service in such a manner as to advance the interests of the all-rail routes" (see 37 I. C. C., pp. 78 and 79; Record, p. 78).

(3) "Fast freight line" arrangements.

The Commission found that the Lehigh Valley Railroad, operating between New York and Buffalo, has in effect arrangements with the Michigan Central Railroad, the Nickel Plate Railroad, the Wabash Railroad and others, west of Buffalo, operating to Chicago, St. Louis and other western points known as "fast freight lines". The Commission's findings in reference to fast freight lines do not describe these lines or give

any adequate indication as to what they are. It was, however, stated to the Court by Mr. Hines, the attorney representing the Interstate Commerce Commission, at the time of the argument, that the fast freight lines as they exist to-day are simply joint soliciting agencies of the various railroads included in a through route and joint rate arrangement. They own no cars or equipment, have no control over railroad operation and have no power to route freight other than that of any freight solicitor of any of the roads over which the freight moves. The Commission's findings in reference to fast freight lines are largely historical and are as follows:

> "The 'fast freight line' was the forerunner of the through route and had its origin in the lack of arrangements for the interchange of equipment. These fast freight lines acquired large numbers of freight cars and made arrangements with certain roads over which it was desired to establish a through service. This through service could be established by using several different combinations of roads, so there was the same rivalry and striving between these several roads to be members of the particular fast freight line as exists under through route arrangements. The through route established, their business then is to solicit through shipments of freight to move all rail over the 'line' that has been organized. To this end soliciting offices were established in many trade centers. The participation in these 'fast freight lines' entails the same sacrifice on the part of these petitioners' boat lines as was pointed out with respect to the through route arrangements. These roads are members of 'fast

freight lines' which are still in existence, and in the nature of things the best interests of their boat lines are made subservient to the interests of their rails, which, of course, are of much greater importance.

The Lehigh Valley Railroad Company is a party to and has a proprietary interest in the Traders Dispatch and the Lehigh Valley-Wabash Dispatch, fast freight lines reaching Chicago and Milwaukee, ports served by boats of the Lehigh Valley Transportation Company. This petitioner in the year 1913 contributed $69,208.27 to cover its share toward the maintenance of the Traders Dispatch."

* * * * *

"The Lehigh Valley Railroad Company insists that if its participation in these fast freight lines and contributions to them is wrong and contrary to law, it is ready and willing to make any changes that might be suggested by the Commission. While such a position is commendable, these cases are to be tried on facts, not promises for future performances, and under the amendment, the Commission is empowered only to pass on the facts of past and present conditions as presented." (33 I. C. C., pp. 708 and 709; Record, pp. 63 and 64.)

"In support of the petitioner's first contention it was further urged that the Commission erred in finding that the participation of the railroad company in fast freight lines which compete with the lake service tended to show competition, since these fast freight lines are said to be mere trade names employed for advertising purposes, and in fact imply no more than the existence of joint rates and through routes.

It will be manifest from a reading of the

Commission's original opinion that the two considerations just noted were not deemed by the Commission in themselver to be conclusive evidence of competition. The participation of the railroad company in fast freight lines, joint rates, and through routes, which run parallel to through routes in which the lake line participates, were deemed significant as showing that in addition to the purely local traffic of the railroad and the lake line, as to which there could be no competition, these companies were largely interested in through traffic as to which there might be competition" (37 I. C. C., p. 78; Record, p. 77).

(4) The Lake Lines Association.

The Lake Lines Association was an organization composed of all the package freight boat lines operating on the Great Lakes, and its headquarters were at Buffalo, N. Y. In charge of these headquarters was a "Commissioner of Lake Lines". The Lehigh Valley Lake Line was a member of the Lake Lines Association. The Commission's determinations of fact in reference to the Lake Lines Association are as follows:

"The Lake Lines Association is an 'understanding organization' which, while claiming not to be an organized agency, has held meetings, the records of which, as shown in the evidence presented in these cases, indicate that its function is to insure a 'proper' management of these lines, from the viewpoint of the railroads, which could not have been possible if their operation were unrestrai[illegible]. The whole arrangement might be classed as a 'get together move-

ment' to which all the roads here petitioning are parties. While these these two petitioning roads which are here specifically under consideration may not directly compete with their boat lines over the rails of their systems, their membership and activity in this association or participation in any like understanding places them in a position inimical to the best interests of their boat lines. Placed in such an attitude these roads, through the agency of other roads with which they are 'partners', become the competitors of their own boat lines" (33 I. C. C., p. 709; Record, pp. 64 and 65).

* * * * *

"The above circumstances, together with the large volume of evidence showing aggressive activities of the Trunk Line Association and the Lake Lines Association, to which the Lehigh Valley Railroad Company was a party, in developing and extending the traffic over the all-rail through routes at the expense of the lake-and-rail routes, including that in which the lake line participated, demonstrated that the possibility of competition for through traffic between the railroad company and its rail connections and the lake line was real and substantial—so real and substantial that the railroad company acting with other trunk lines organized and maintained the Lake Lines Association, a chief function of which was the controlling of lake rates and service in such a manner as to advance the interests of the all-rail routes" (37 I. C. C., pp. 78 and 79; Record, p. 80).

The importance of the Lake Lines Association, in so far as the Appellant is concerned, is at this time practically *nil*, as the Commission's own re-

ports show that the various railroad-owned lake lines have been separated from their railroad owners and do not exist. There can, therefore, be no "Lake Lines Association".

(5) The Trunk Line Association.

The fact that the Lehigh Valley Railroad Company, the Appellant, is a member of the Trunk Line Association was one of the facts determined by the Commission in respect of competition or the possibility of competition by the Appellant with its Lake Line. The Trunk Line Association is not adequately described by the Commission in its report and apparently the facts determined in respect of this association in so far as they have a bearing on the question of competition between the Lehigh Valley Railroad and its Lake Line did not assume very great importance in the mind of the Commission. The Trunk Line Association is the working body of the eastern railroads with which the Interstate Commerce Commission carries on many of its functions in reference to rates, classifications, etc., and for that reason the Commission doubtless did not think it important to more adequately describe it. The Commission's determinations of fact, however, in reference to the elements of competition or the possibility thereof involved in the Appellant's membership in the Trunk Line Association are as follows:

> "The lake lines in which the petitioners are interested have been shorn of the initial rate-making power. This power has been usurped by the trunk line association of which

the petitioners are members. The through rates controlled by this authority, in which the boat lines are merely concurring carriers, determine for the shipper which lake line must be used. The particular route is controlled by applying arbitrarary switching charges at Buffalo, which compel the through lake-and-rail traffic to move via the predetermined lake line. The zones of territory to be served and those not to be served by the lake lines are also determined by this outside authority. This is accomplished by maintaining a scale of rates, not subject to competition, that forces traffic by either all-rail or lake-and-rail routes, as desired by the trunk line association. The interest and concern of the trunk line association in fixing these different combinations or rates is simply the solidified interest of the several member railroads, whose individual interests have been above indicated" (33 I. C. C., pp. 709 and 710; Rec., p. 65).

"The above circumstances (through routes and joint rates and fast freight lines), together with the large volume of evidence showing aggressive activities of the Trunk Line Association and the Lake Lines Association, to which the Lehigh Valley Railroad Company was a party, in developing and extending the traffic over the all-rail through routes at the expense of the lake-and-rail-routes, including that in which the lake line participated, demonstrated that the possibility of competition for through traffic between the railroad company and its rail connections and the lake line was real and substantial—so real and substantial that the railroad company acting with other trunk lines organized and maintained the Lake Lines Association, a chief function of which was the controlling of

lake rates and service in such a manner as to advance the interests of the all-rail routes" (37 I. C. C., pp. 78 and 79; Record p. 80).

(6) Divisions of the through rates received by the Appellant, the Lehigh Valley Railroad Company, from rates in effect with its Lake Line as compared with divisions of the through rates received from its all-rail connections west of Buffalo.

The Commission made certain determinations of fact in reference to the financial reasons why the Lehigh Valley Railroad, the Appellant in this case, desired to injure its Lake Line and benefit its all-rail connections west of Buffalo, apparently inferring that the alleged injury thus outlined was an element of competition or potential competition between the two. The Commission stated that the Appellant railroad received a larger proportion of the through rate from its all-rail connections west of Buffalo than it received from the through rate over its own Lake Line between Chicago and points on its rail line. The Commission did not consider this subject at all in its first opinion, following which it issued an order separating the Appellant from its Lake Line. The subject was not even mentioned. However, in its opinion upon the Appellant's application for rehearing the following comments were made:

"This leads to the inquiry: What interest has the Lehigh Valley Railroad in all the all-rail rates from Chicago to the east? Its chief interest obviously is in the amount of the division of the all-rail rate which it is able to exact from its rail connections. If the Le-

> high Valley was wholly dependent on its rail connections they would be in a position to dictate the division it would receive. While the Lehigh Valley has a lake line, however, it has a voice in what the all-rail rate should be and, what is more important, it is in a position to demand large divisions of these rates. *The record shows, as might be expected under such conditions, that on most of the eastbound traffic the Lehigh Valley Railroad divisions of the all-rail rate from Chicago to the east are larger than its division of the lake-and-rail rate for the same haul. Thus it has come about that the railroad gets more revenue out of the all-rail haul than out of the lake-and-rail haul on a particular shipment.* Here, then, is a situation where the interest of the Lehigh Valley Railroad directly conflicts with the interests of the lake line. To the extent that the Lehigh Valley Railroad is induced by its division of the all-rail rates to divert traffic from the lake-and-rail to the all-rail route it is 'striving' against the lake line which it owns." (37 I. C. C., pp. 79 and 80; Record, p. 79).

The Commission could not have attached any real importance to its own statement to the effect that the Appellant receives less money from its Lake Line divisions than it does from its all-rail connections, for the subject matter had often been discussed and commented upon by the Commission in other cases and a contrary situation clearly shown. In fact the Commission gave as one of its reasons for not allowing an increase in the lake and rail rates, viz., the rate via the Appellant's

rail line and lake line, the following (see *Rates via Lake and Rail Routes*, 37 I. C. C., p. 307):

> "Equally apparent is it that the lake lines have practically no voice in naming the divisions of the rates."

The meaning of this sentence is that the Lehigh Valley Railroad takes whatever division it cares to take out of the through rate via its lake and rail route. The Commission has never found that the Railroad could act with the same freedom in reference to its all-rail connections west of Buffalo. If the Railroad take whatever it cares to take from the rate via its own lake line it can hardly be seriously alleged that it fails to secure as great a division of the through rate in this manner as it receives in bargaining with its all-rail connections west of Buffalo. These contrary findings or determinations of fact made by the Commission are called to the attention of the Court for the purpose of showing upon what kind of determinations of fact the order of the Commission separating the Lehigh Valley Railroad from its boat line was based.

(7) Mistreatment of Lake Line by Appellant by control of routing of westbound traffic and diversion of same from the railroad's own lake line to the railroad's all-rail connections west of Buffalo.

One of the facts determined by the Commission in reference to competition or the possibility of competition between the Lehigh Valley Railroad and its lake line was that the railroad controlled the routing of westbound traffic, and that in this

control it diverted traffic west of Buffalo from its own lake line to its all-rail connections and thereby competed with its lake line. The determinations of the Commission in this respect are as follows:

> "These petitioners, in connection with all central freight association territory rail carriers, as shown by their concurrences, are the joint makers of tariffs publishing joint through rates for the all-rail transportation to and from the ports served by their boats. The only thing to indicate that the entire all-rail haul is not performed by their respective lines is the concurrence of their connections in these rates. Together with their connections they make a through line from the east to the lake ports over which both eastbound and westbound traffic moves all-rail. *They originate the westbound traffic and control its routing.* The actual results of these arrangements is the same as if these petitioners owned the rails reaching these ports.
>
> "The all-rail connections of the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company, which participate in the through route west of Buffalo, are capable of delivering to these roads at Buffalo many times the volume of eastbound tonnage that it would be possible for these roads to originate through the medium of their own boat lines and deliver to their rails at Buffalo. These petitioning roads, therefore, are very solicitous to promote and improve their relations with their western rail connections. Through route arrangements are reciprocal, since the entire movement of traffic is not in the one direction. So the one most potent way in which these petitioning roads can encourage a routing of the eastbound traffic from these western rail

connections over their rails is to route as much westbound traffic as possible over the particular connection or connections which are able to furnish the most eastbound traffic. The westbound traffic which is so routed is necessarily diverted from the boats of these petitioners. This sacrifice of the boat lines is small when compared to the gains made by these petitioning carriers in the interchanging of all-rail traffic. The eastbound all-rail traffic in almost every instance might just as well be turned over at Buffalo to one of the several rivals of the petitioners extending east. The striving or rivalry for this eastbound traffic causes these petitioners to divert westbound traffic from their boats, and when they do this they are competing with their boats within the meaning of the act as amended" (33 I. C. C., p. 707; Record, pp. 61 and 62).

The bearing upon the question of competition or the possibility thereof which the determination of facts outlined above assumed in the mind of the Commission itself may be learned from the Commission's former opinions and conference rulings in this respect. It is respectfully submitted that the Commission itself placed no importance upon its own determinations of fact in respect of this subject, The Commission's findings quoted above indicate that the Railroad Company in some manner controlled westbound through traffic, and in order to secure eastbound traffic from Buffalo to New York on its rails it directs that the westbound traffic it controls from Buffalo to Chicago, and points west, be forwarded from Buffalo by one of its all-rail connections, rather

than by its boat line. This all-rail connection will in turn route eastbound traffic over the Appellant's rail line in order to pay the Appellant for routing westbound traffic over its rail line.

It is, of course, a patent fact that there are but three kinds of traffic moving west, as far as routing is concerned, which are as follows:

1. Traffic routed by shippers.

2. Traffic delivered by shippers to the railroad unrouted, leaving the railroad itself to select whatever route it may desire.

3. Traffic moving West shipped by the railroad itself as the owner thereof.

There is no indication, in the Commission's opinion, that the railroad moves its own traffic or is a shipper, and such a situation would, of course, be a violation of the Commodities Clause, and is not to be considered in this case.

Traffic falling within the first class, viz., that routed by the shipper, is covered by the Commission's conference rulings and opinions. In Conference Ruling No. 332, dated December 11, 1911, the Commission said:

> "332. CARRIERS FAILING TO OBEY ROUTING INSTRUCTIONS LIABLE TO PROSECUTION. It is the view of the Commission that interstate carriers failing or refusing to observe specific routing instructions by the shipper are liable to prosecution under Section 10, the right to determine the through line or route over which his freight shall be transported having been expressly reserved to the shipper under Section 15 of the Act as amended on June 18, 1910."

In *Morris Lumber Company* v. *Louisville & Nashville Railroad Company*, 33 I. C. C. 571, at page 572, decided on April 12, 1915, the Commission said:

> "Section 15 of the act to regulate commerce, as amended, insures to shippers the right to route their shipments, and as we said in the case of *Weyl-Zuckerman & Co.* v. *C. M. Ry. Co.*, 27 I. C. C. 493, 495: 'No exceptions or regulations affecting this provision of the statute have been promulgated by the Commission, and no stipulation in the bill of lading can operate to exempt the carrier from the duty imposed by law'."

It is therefore evident that the Commission did not intend to include in the traffic over which the Appellant Railroad Company has control traffic which the shipper himself routes.

The second class of westbound traffic, the routing of which it is alleged is controlled by the Appellant Railroad, is traffic delivered to the Appellant by shippers without the route by which it is to move having been designated. The Railroad Company must therefore designate the routing of this traffic. The Commission gives no indication as to the amount of such traffic, doubtless for the reason that its own opinions and conference rulings show that the subject has no practical importance in this case whatsoever. The Commission, in its report in *Rates via Lake and Rail Routes* (37 I. C. C. at p. 322), shows that the all-rail rate between New York and Chicago on first class traffic is 16.8 cents higher than the lake and rail rate. If, therefore, the Appellant

Railroad routed traffic via an all-rate route, instead of a lake and rail route, if the latter were open, the shipper or consignee would pay on first class traffic 16.8 cents per hundred pounds more than he would have paid on the same if it had been forwarded by the Appellant's rail line and lake line. This extra charge would amount to $3.36 per ton between New York and Chicago. If the unrouted freight offered to the Appellant should have been second class, instead of first class, the shipper or consignee would have paid $2.86 per ton more on account of it having been routed all rail than he would if it had been routed lake and rail. These are illustrations of what would happen if the Appellant Railroad Company did, as a matter of fact, send unrouted traffic by all rail from New York to Chicago instead of lake and rail.

The Commission indicated very clearly what the law is in respect of routing traffic in the *American Agricultural Chemical Company* v. *Boston & Albany Railroad Co.*, 28 I. C. C. 398, at page 400, as follows:

> " If the shipper had tendered its traffic unrouted, *it would have been the duty of the initial carrier to forward it by the cheapest available route*, but the carrier was bound to obey the shipper's routing instructions."

If, therefore, westbound traffic were tendered to the Appellant Railroad unrouted, and the Appellant Railroad desired to route the same via its all-rail connections west of Buffalo, rather than its own lake line, it could not under the law laid down by the Commission route such traffic by other

than the "cheapest available route", which in the premises would be its own rail line to Buffalo, with its lake line from Buffalo to Chicago. If, however, the Railroad Company did fail to route unrouted traffic by the cheapest available route in order to secure some advantage for itself as against its Lake Line, the shipper or consignee thus injured could avail himself of the right given by Section 16 of the Act to Regulate Commerce, and ask for and secure reparation from the offending railroad.

It is therefore clearly evident that the determination of facts in reference to the diversion by the Appellant Railroad of westbound traffic from its lake line assumed little importance to the Commission itself, in view of its own power and control over such matters and full and complete regulation or the same.

(c) *A summary of the determinations by the Commission of questions of fact as to the competition or the possibility thereof between the Appellant and its Lake Line shows that the existence of through routes and joint rates between the Railroad and its western connections is the sole basis of the Commission's decision.*

A summary of the determination of facts found by the Commission indicates that *all are elements or collateral incidents of through routes and joint rates.* If the Lehigh Valley Railroad had not had in effect with its all-rail connections west of Buffalo through routes and joint rates the Commission would not have denied its petition to

continue in the ownership and operation of its Lake Line. If the Railroad had not had in effect these through routes and joint rates the Commission would not have considered "fast freight" line arrangements over the Appellant's railroad and its all-rail connections as a fact having a bearing on the question of competition between the railroad and its Lake Line. If through routes and joint rates had not been in existence the Commission would never have mentioned the fact of the membership of the Appellant in the Lake Lines Association or in the Trunk Line Association. If there had been no through routes and joint rates there would have been no divisions of these rates and the Commission would not have mentioned the Appellant's divisions with its all-rail connections west of Buffalo as an element of competition. If there were no through routes and joint rates in effect the Commission would not have seized upon the alleged control by the Appellant of the routing of westbound freight as an element of competition. All the findings of fact made by the Commission rest upon the theory that Congress decreed that all water lines should be separated from their rail owners. All rail lines have in effect through routes and joint rates, and by means of these through routes and joint rates they compete with any water line they might own anywhere in the United States, according to the Commission's decision.

It was conceded in the argument of this case in the District Court in reply to questions asked by the Court that if there were no through routes

and joint rates via the Lehigh Valley Railroad and its connecting lines west of Buffalo, there would be no competition or the possibility of competition under the act between the Lehigh Valley Railroad and its boat line. The Commission itself, in its report in this case 33 I. C. C., p. 707, practically concedes that the existence of through routes and joint rates over the Lehigh Valley Railroad and its western rail connections is the one circumstance that overshadows everything else and controls its decision. The Commission said:

> "That the existence of paralleling through all-rail routes to which joint through rates are applicable in which the petitioning railroad participates, is a circumstance bringing any application under this amendment within its provisions, seems clear when the amendment is considered in its application to the railroad ownership of or interest in boats operating through the Panama Canal."

It is true that the Commission then proceeded to refer to all of the facts outlined above.

The Commission referred to "fast freight lines", but in its reports stated that these "fast freight lines" operate over through route and joint rate connections. The very existence of fast freight lines, although they are only soliciting agencies, depends absolutely upon through route arrangements.

The Commission then referred to the Lakes Lines Association. As the component elements of this Association have been dissolved, it is as-

sumed that its importance, in the mind of the Commission, has ceased to exist.

The Trunk Line Association and its alleged control over rates is only mentioned by the Commission on account of the alleged control over *through routes and joint rates.* The very basis of the Commission's assertion, that the Trunk Line Association and the complainant's membership therein constituted an element of competition, was based upon the existence of through routes and joint rates. If there were no through routes and joint rates over the Lehigh Valley Railroad and its western all-rail connections it would not have been stated by the Commission that the Trunk Line Association or any other organization controlled any "through routes and joint rates". The very basis, therefore, of the Commission's allegations in reference to the Trunk Line Association and the Lehigh Valley Railroad Company as a member thereof rests upon the existence of through routes and joint rates.

All of the Commission's allegations in reference to the alleged origination of westbound traffic by the Lehigh Valley Railroad and the control of the routing thereof was premised upon the existence of some kind of through route arrangements between the Lehigh Valley Railroad and its connections from Buffalo west.

The statements of the Commission wherein it was alleged that the Lehigh Valley Railroad secures greater divisions of the through rate from its all-rail connections than it does from its own lake line are based upon the "through route and joint rate" arrangements in existence. It is, of

course, apparent on the face of the statement that there could be no "divisions of a joint rate" unless such joint rate existed.

It is, therefore, clear that every element of competition or possibility of competition determined by the Interstate Commerce Commission in either of its opinions is an element of and a necessary incident to through routes and joint rates. If, therefore, the Lehigh Valley Railroad did not have in effect over any rail lines west of Buffalo through routes and joint rates there could be no "competition" or possibility of competition between the railroad and the lake line upon the face of the Commission's own findings of fact.

(3) Through routes and joint rates over the Lehigh Valley Railroad and its rail connections west of Buffalo, are made necessary by the Act to Regulate Commerce and the Commission itself can and would establish them under the power given it by the Act. They cannot therefore be considered "competition" or the possibility of competition under the Act.

It is respectfully submitted that the Commission itself considers the existence of through routes and joint rates between the Lehigh Valley Railroad and its connections west of Buffalo not only as necessary, but as legal. The Commission said in this respect on page 706 of its report (Record, p. 61):

> "The through all-rail routes and joint rates which these roads maintain with carriers connecting at their lake interchange points for points beyond, including the ports served by

> their boats, *are legitimate and necessary arrangements for the convenience and facility of the rail transportation.*"

It is respectfully submitted that the Commission could not do otherwise than find that the through routes and joint rates in existence were *both necessary and legal.* The Act to Regulate Commerce, in Section 1 thereof, provides as follows:

> "*It shall be the duty of every carrier* subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and *to establish through routes* and just and reasonable rates applicable thereto, and *to provide reasonable facilities for operating such through routes.*"

It is, therefore, not only the duty of the complainant in this case to establish through routes, but it is the duty of the complainant to provide "reasonable facilities for the operation thereof."

The Commission for many years could not establish through routes and joint rates, and deprecated this fact almost every year in its annual report. In 1906 it was given power to establish through routes and joint rates, "provided no reasonable or satisfactory through route exists", and this provision applied when one of the connecting carriers was a water line. This was the amendment to Section 15 by the Act of June 29, 1906. The amendment to Section 15 of the Act to Regulate Commerce, passed June 18, 1910, eliminated the only condition by which the Commission was bound in reference to the es-

tablishment of through routes and joint rates, and provided as follows:

> "The Commission may also after hearing on a complaint, or upon its own initiative without complaint, establish through routes and joint classifications and may establish joint rates as the maximum to be charged, and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused to neglect to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line."

Congress was even more generous in providing the Commission with power over through routes and joint rates in 1910 than is indicated by the broad provisions of Section 15, quoted above. Section 1 of the act was also amended by the Act of June 18, 1910, and the duties of carriers in reference to through routes and joint rates were increased as follows:

> "and to provide reasonable facilities ıor operating such through routes and make reasonable rules and regulations with respect of the exchange, interchange and return of cars used therein and for the operation of such through routes, and providing for reasonable compensation for those entitled thereto."

Thus, at the end of 1910, Congress had imposed upon the Lehigh Valley Railroad the duty to establish through routes and joint rates with its

western rail connections, also to make reasonable rules and regulations therefor and had given the Interstate Commerce Commission power to establish through routes and joint rates, power to determine the divisions thereof if the carriers themselves were unable to agree, and power to determine what are reasonable rules and regulations with respect of these through routes and joint rates.

What the Commission itself thinks of its power in reference to through routes and joint rates may be found in the *Flour City Steamship Company* v. *Lehigh Valley Railroad Company*, 24 I. C. C., p. 179, at pp. 184-185. The Commission said in reference to Section 1 of the act:

> " The duty under this section is two fold; first, *through routes must be established*, and second, *just and reasonable rates are applicable thereto.* * * * The theory of this provision is that carriers should freely interchange freight between their respective lines, to the end that interstate commerce may move without interruption or delay."

The Commission then discussed the broad provisions of Section 15 of the act, quoted above, and said:

> " Prior to 1910 our power to establish through routes was limited to instances in which no satisfactory through route existed. The elimination of this limitation placed within the discretion of this Commission the establishment of additional routes. In the exercise of this discretion the existence of through routes capable of adequately and expeditiously handling all traffic offered is en-

> titled to much consideration, but no longer constitutes a barrier to another through route."

The policy of Congress in reference to the existence of through routes and joint rates, their necessity and the control thereof by the Commission, was not limited in its determination to the sections of the Interstate Commerce Act referred to above. Section 15 of the act provides that the shipper who delivers property to any common carrier subject to the provisions of the act for transportation over any through route, "subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time prescribe, has a right to designate in writing by which of such through routes such property shall be transported to destination".

It is then provided that it is the duty of the initial carrier to issue a through bill of lading for this property over all the connecting lines composing the through route. It is then provided:

> "That the shipper shall in all instance have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

The shipper is, therefore, given absolute control over the routing of his property, no matter how many through routes and joint rates may be in existence.

The solicitation of Congress for the through

route is still further emphasized by the Carmack amendment, which provides that any common carrier receiving property for transportation from a point in one state to a point in another, shall issue a receipt or bill of lading therefor and

> "shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier * * * from the liability hereby imposed".

It is respectfully submitted that through routes and joint rates, with all the elements thereof, regulations and provisions in reference thereto, have been completely and fully covered by the Act to Regulate Commerce, and that the Lehigh Valley Railroad Company must employ them in performing what Congress has laid down to be its transportation duty, and that it must govern them by rules and regulations which are subject to the Interstate Commerce Commission.

It is thus clear that the very elements found by the Commission to exist in the relationship of the Lehigh Valley Railroad and its lake line as constituting competition or the possibility of competition between the two are the elements of through routes and joint rates over which the Commission itself asserts an almost unlimited control. The Commission is given power to establish the very through routes and joint rates which it has determined to be the fact constitu-

ting competition between the Lehigh Valley Railroad and its lake line. The Commission stated in its opinion that if these through routes and joint rates did not exist, it would establish them itself, for it says that they are not only *necessary, but that they are legal.* We are, therefore, confronted with the proposition that the existence of a relationship between the Lehigh Valley Railroad and its western rail connections which the Interstate Commerce Commission considers as necessary and legal, which it is empowered to enforce, and practically states that it would enforce if it did not exist, is proposed to this Court as constituting the competition or the possibility thereof, on account of which the Interstate Commerce Commission assumes jurisdiction to deprive the complainant of a million and a quarter dollars' worth of its lake line property. It is respectfully submitted that such a conclusion is contrary to all the principles of justice and equity heretofore applied to statutory interpretation.

(4) The determinations of fact as to competition or the possibility thereof made by the Commission show that the Commission's construction of the word "competition" found in the Act is not the natural and ordinary meaning of the word as intended by Congress.

The decision of the Commission that the word "competition" as used in the Panama Canal Act contemplated the facts found by the Commission in its report, cannot and does not, it is respectfully submitted, rest upon any substantial legal basis. The word "competition" found in the Act was used by Congress "in its natural sense" and

must be so considered by the Commission and the courts.

The Commission does not have the prerogative to interpret a statute that involves the absolute destruction of the property of citizens by any other canons of statutory interpretation than those laid down by law and usage. The Supreme Court has said more than once that a statute empowering the Commission by an administrative order to destroy property rights is to be interpreted *in its natural sense.* Mr. Justice Holmes said (*Interstate Commerce Commission* v. *Northern Pacific Railway*, 216 U. S. 538, at p. 544), in reference to this subject:

> " The difficulty of distinguishing between a rule of law for the guidance of a court and a limit set to its power is sometimes considerable. Words that might seem to concern jurisdiction may be read as simply imposing a rule of decision, and often will be read in that way when dealing with a court of general powers. *Fauntleroy* v. *Lum*, 210 U. S. 230, 235. But even in such a case there may be a difference of opinion, *ibid.* 245, *and when we are dealing with an administrative order that seriously affects property rights, and does so by way rather of fiat than of adjudication, there seems to be no reason for not taking the proviso of the statute in its natural sense.* See *Interstate Commerce Commission* v. *Central R. R. Co.*, 215 U. S. 452, 470."

Mr. Justice Strong said (*Union Pacific Railroad* v. *Hall*, 91 U. S. 343, at p. 347), in reference to the construction of the word " boundary ":

> " Congress may well be supposed to have used language in accordance with the common understanding."

In *Water Power Company* v. *Street Railway Co.*, 172 U. S. 475, at page 491, Mr. Justice Brown said in reference to the construction of the word "absolute" in a statute:

> "In construing statutes, words are to be taken in their ordinary sense."

In *Louisville & Nashville Railroad Company* v. *Mottly*, 219 U. S 467, at page 474, Mr. Justice Harlan said:

> "Our duty is to ascertain the intention of Congress in passing the statute upon which the Railroad Company relies as prohibitive of the further enforcement of the agreement in suit. That intention is to be gathered from the words of the act (the Act to Regulate Commerce), *interpreted according to their ordinary acceptation*, and, when it becomes necessary to do so, in the light of the circumstances as they existed when the statute was passed."

It must be remembered in considering the rules of statutory interpretation applicable to this act that the Interstate Commerce Commission is given the absolute power by administrative order to take away from this complainant its property and property rights. It is, therefore, bound by the rules of statutory interpretation, as well as ordinary justice and equity, to give the word "competition" its natural and ordinary meaning.

Congress did not leave in doubt what "competition" was covered by the act. Congress declared that competition between "said railroad" and the "common carrier by water" which it owned was

the competition which gave the Interstate Commerce Commission jurisdiction to issue such an order as that before the Court. Congress said that if there was *ordinary business competition* between the Lehigh Valley Railroad and its Lake Line the Commission must issue an order which would result in imposing upon the Railroad a fine of $5,000 per day if it continued in this relationship. If, however, there was not this ordinary business competition the Commission was given no jurisdiction to issue any order whatsoever.

What is the ordinary business "competition" contemplated by Congress?

Competition is an every-day word, used probably as much in current affairs and in business walks of life as any other single word. Every person who hears it understands that it means a rivalry of some kind between persons *who either are doing or can do the same things.* No ordinary man understands that the grocer and barber are in competition. All ordinary men understand that grocers who can by any possibility sell to the same persons are or may be in competition. In accordance, therefore, with the rules of statutory construction, it is respectfully submitted that the meaning of the word "competition" as used in this act by Congress is the ordinary, every-day meaning of the word. Webster defines "competition" as:

> "The act of seeking or endeavoring to gain what another is endeavoring to gain at the same time; *common strife for the same object;* strife for superiority; emulous contest; rivalry, as for approbation, for a prize, or as

to where two or more persons are engaged *in the same business* and each seeking patronage."

This is the ordinary, every-day competition which Congress understood and the public understood and which was meant to be expressed in the act. The Lehigh Valley Railroad Company has nothing to offer to the public which the Lehigh Valley boat line could possibly do. The Lehigh Valley boat line has nothing to offer to the public which the Lehigh Valley Railroad could possibly do. There is, therefore, none of that plain, ordinary, every-day competition between these two companies, and none can by any possibility exist.

The Commission recognized this and proceeded to give the word "competition" a strained and unnatural meaning. It found that in some manner Congress had intended "competition" between a water line and its rail owner to mean "through routes and joint rates" between one rail owner and other rail lines; participation by the rail owner in "fast freight lines"; membership on the part of the rail owner in a Trunk Line Association, and other more remote and more fantastical activities on the part of either the rail owner or its water line. It first determined that there was no competition in the ordinary business sense of the word between the Railroad and its Lake Line, because neither could perform a single act of transportation which the other could perform. This was as Congress intended and as Congress legislated. But such a finding would not give the Commission jurisdiction over the Appellant and

its Lake Line and this jurisdiction was secured by giving the word "competition" a strained and unnatural interpretation. It is respectfully submitted that there is no justification in the act itself or in the purpose of Congress as expressed in the reports on, and debates in reference to, the act for interpreting the word "competition" to apply to any relationship that could possibly exist between the Lehigh Valley Railroad and its Lake Line.

(5) The interpretation by the Interstate Commerce Commission of the meaning of the word "competition" is contrary to the judicial interpretation of the word found in the Union Pacific Case, 226 U. S. 61.

The only legal interpretation of the word "competition" as used in reference to transportation matters is found in the *Union Pacific Case, supra.* This, it is true, was not an interpretation of the word as used in a statute. It was, therefore, not an interpretation of the word "competition" in its "plain, ordinary sense", but an interpretation along broad, general, inclusive lines and referring to competition in transportation as opposed to monopoly in the same.

The Union Pacific Case was brought to enforce the provisions of the so-called Sherman Anti-Trust Act of 1890 against alleged conspiracies and combinations in restraint of interstate commerce. The Union Pacific Railroad Company had purchased certain shares of the capital stock of the Southern Pacific Company, amounting to about 46 per cent. of the outstanding stock of the latter company. It was contended by the Government that prior to

this purchase, the Union Pacific and Southern Pacific were competing systems of railroad and that the acquisition of the stock had eliminated competition between the two systems. The Supreme Court, therefore, considered at length the question of competition in its decision. It was pointed out that the Southern Pacific extended *inter alia* from New Orleans westward to San Francisco and that between New Orleans and New York it operated a line of steamships; that the Union Pacific extended westward from Omaha, Nebraska, and from Kansas City, Missouri, to Ogden, Utah, and Portland, Oregon, with a line of steamships from Portland, Oregon, to San Francisco, California. The court found that these two great systems were in active competition before the purchase of stock referred to, and thus outlined, at page 87 of the report, the competition that existed:

> "To compete is to strive for something which another is actively seeking and wishes to gain. The Southern Pacific through its agents, advertisements and literature had undertaken to obtain transportation for its 'Sunset' or southerly route across the continent, while the Union Pacific had endeavored in the same territory to have freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast.
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> * * * * *
>
> Competition between two such systems consists not only in making rates, which, so far as the shipper was concerned, the proof shows, were by agreement, fixed at the same figure whichever route was used, and then

apportioned among the connecting carriers upon a basis satisfactory to themselves, but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their revenues. The inducement to maintain these points of advantage—low rates, superiority of service and accommodation—did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment."

If the Lehigh Valley Railroad Company is, under the definition of "competition" outlined by the Supreme Court in the above case, competing with its lake line, the following situations must exist:

(*a*) The Lehigh Valley Railroad must be striving for something which the Lehigh Valley boat line is actively seeking and wishes to gain. There cannot be a pound of freight which the Lehigh Valley Railroad can seek for itself and which by such seeking it can take from the Lehigh Valley boat line. The two lines must be complementary in order that the one be able to seek and take from the other that which the other desires. The Lehigh Valley boat line and rail line connect, and one cannot carry anything to

the exclusion of the other, but may carry freight in connection with the other.

(*b*) Rate making:

As the two lines are supplemental and the one cannot carry anything to the exclusion of the other, there can be no competition between them in rate-making.

(*c*) Character of service rendered:

As the Lehigh Valley lake line and rail line seek to carry the same freight only in connection with each other, there can be no competition between the two in the matter of service. There may be competition and must be between the lake line and the other railroads paralleling it, *i. e.*, other railroads which could either in whole or in part perform the same service it performs if the opportunity were offered.

(*d*) Competition in the accommodation of the shipper in handling and caring for freight and in the prompt recognition and adjustment of the shippers' claims:

Here again the subject matter of the competition itself makes competition between the Lehigh Valley boat line and lake line impossible. The rail line cannot compete with the boat line in furnishing accommodations to shippers when the two do not reach the same points, but are only supplements, the one to the other. The rail line and the boat line cannot compete with each other in the adjustment of shippers' claims when the ship-

pers' claims have no reference to the transportation between the same points on the lake line and the rail line.

By this final test of competition laid down by the Supreme Court of the United States, it is a practical and physical impossibility for two supplemental lines, a rail line and a boat line connecting at one point, neither having the possibility of performing any part of or all the service performed by the other, to be in competition with each other.

The Supreme Court clearly stated that the Union Pacific sought to transport and could transport traffic which the Southern Pacific desired to transport and could transport over its lines between the eastern and western portions of the United States. It is true that these great systems did not reach the same eastern termini by their rails or by any transportation system under their control. Each was, however, able to transport any traffic that might be offered over a *large portion of the distance*, between the eastern and western portions of the United States. This is not true in any respect of the relationship between the Lehigh Valley Railroad Company and the Lehigh Valley lake line. The Railroad Company cannot transport freight over any portion of the distance over which the boat line can by any possibility transport it. If the Supreme Court in the Union Pacific Case had decided that the Union Pacific Railroad Company, connecting with the Pennsylvania Railroad Company at Chicago, was a competitor of the Pennsylvania Railroad Company between Portland, Oregon, and New York City, the Interstate Commerce Commission might

with some justification have used such a decision as a basis for separating the Lehigh Valley Railroad from its lake line, the Lehigh Valley Transportation Company, on the ground that the two were in competition. It is evident that either the Union Pacific or the Southern Pacific could carry the same traffic destined to New York half way across the continent, whereas the Lehigh Valley Railroad and the Lehigh Valley boat line could neither carry the same traffic any portion of the distance that the other could carry it. The Panama Canal Act is specific in its statement that the competition or possibility thereof must be between a rail owner and the water line owned thereby. There is no provision against the competition of the Lehigh Valley Railroad Company's lake line and the Nickel Plate Railroad, or the Grand Trunk Railroad or any other railroad with which the Lehigh Valley Railroad may have through routes and joint rates in effect. Through routes and joint rates between the Lehigh Valley Railroad and other railroads are made necessary by the Act to Regulate Commerce, and it can hardly be supposed that Congress would in the same act solemnly declare that the Lehigh Valley Railroad Company should establish through routes and joint rates with the Nickel Plate, running west from Buffalo to Chicago, with the Grand Trunk, running west from Buffalo to Chicago, and other lines, and at the same time declare that for so doing the Lehigh Valley Railroad Company must forfeit its lake line between Buffalo and Chicago.

(6) The Commission's conclusion that the establishment of through routes and joint rates by the Appellant with its all rail connections west of Buffalo constitutes competition between the Appellant and its boat line nullifies the specific exception provided by Congress that the Act does not apply to any rail owner of a boat line where such rail owner does not or may not compete with its boat line.

The Commission's conclusion broadens the Act, making it unlawful for any railroad to own and operate any water line. Congress must have meant something when after considerable debate it refused to enact an absolute prohibition against the ownership of water lines by railroads. When Congress said that the Act did not apply to railroads which did not compete with water lines owned by them it must have had in mind that there were some situations of this sort in the United States. The Commission has, however, and the District Court has sustained it, decided that Congress did not mean anything by this exception; that there is no exception, and that all water lines must, under the Act, be separated from their rail owners. The Commission has fully demonstrated the proposition that it does not recognize the exception mentioned by Congress in the Act in its numerous decisions concerning other rail owners of water lines than the Appellant in this case. The Commission has at this date, January 31, 1916, filed its written opinion in 30 separate cases under the Panama Canal Act. An appendix is attached to this brief enumerating the written reports of the Commission in this

respect. In all of these cases except four the Commission found that there was competition between the rail owners and their boat lines, and in every instance the basis of this competition was the fact that the rail lines had through routes and joint rates with certain of its rail connections which paralleled the boat lines.

In the four cases in which the Commission found that there was no competition or the possibility thereof, the reason therefor and the fact determined by the Commission upon which this conclusion was based was that no through routes and joint rates existed between the rail owner and other rail lines which paralleled the boat line. The Commission, however, in each of these cases stated that there would be competition as soon as through rates and joint routes were put in. The four cases in which the Commission decided that no competition or the possibility of competition existed between the water line and its rail owner were so unimportant and insignificant that they really make no exception to the Commission's broad, general proposition that all water lines compete with their rail owners by means of through routes and joint rates, which the rail owner has with its rail connections. The following are the four cases referred to:

(1) Steamboat service to a summer resort owned by a narrow gauge railroad in California. Lake Tahoe Railway and Transportation Company's ownership of boat line on Lake Tahoe. 33 I. C. C. 426, decided March 22, 1915.

(2) Ownership of a schooner plying between certain points on the Pacific coast. Southern Pacific Company's ownership of schooner *Pasadena*. 33 I. C. C. 476. Decided March 30, 1915.

(3) Ownership of a steamboat making a 32-mile journey on a Florida River. Application of Georgia, Florida & Alabama R. R. Co. 33 I. C. C. 632. Decided April 27, 1915.

(4) Ownership of a boat line on Lake Keuka, New York. Application of Erie R. R. Co. for continuation of ownership and operation of Lake Keuka Navigation Co. 34 I. C. C. 212. Decided May 29, 1915.

In all of the cases involving the ownership and operation by railroads of water lines of any economic consequence whatsoever the Commission determined that the fact of the existence of through routes and joint rates between the rail owners and their all-rail connections constituted competition between the rail owner and its water line and gave the Commission jurisdiction over the same under the Act. These applications cover the ownership by railroads of steamship lines on the Columbia River (see 33 I. C. C. 658), on the Sacramento River (see 34 I. C. C. 174), steamship service between Portland and San Francisco on the Pacific Ocean (see 34 I. C. C. 165), car ferries and car floats across Lake Michigan (see 34 I. C. C. 54), car floats across the Strait of Mackinac, (see 34 I. C. C. 229), boat service on the Chesapeake Bay and its branches (see 35 I. C. C. 692),

steamship service between Savannah and New York (see 37 I. C. C. 422), and steamship service on the Great Lakes between Duluth, Minn., Chicago, Ill., Milwaukee, Wis., and Buffalo, N. Y. (see 33 I. C. C. 699). In fact the Commission in all of the decisions referred to found that Congress had legislated against the ownership by railroads of any water lines whatsoever. It is true that in a large number of these cases the Commission, under the second part of the Act, which is not involved in this proceeding, allowed certain railroads to continue in the ownership and operation of their water lines on the ground that it was for the convenience and advantage of the public that they do so.

It is respectfully submitted that no provision of a statute can be nullified by an administrative body so that the terms of the statute are broadened beyond the plain wording thereof. The Supreme Court said in *Market Company* v. *Hoffmann*, 101 U. S. 112, at page 115, in reference to nullifying a provision of an act of Congress in the manner in which the Commission has done in this case:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall be, if possible, accorded to every word. As early as in Bacon's Abridgement, sect. 2, it was said that 'a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant'. This rule has been repeated innumerable times."

In *Brewer* v. *Blougher*, 14 Peters 178, at page 198, the Court said in reference to extending the language of an act to cases which the legislature never designed that it should embrace:

> "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import if the court are satisfied that the liberal meaning of its language and the extent to cases which the legislature never designed to embrace in it."

It is respectfully submitted that the Commission would not have found it necessary to nullify the exception Congress specifically placed in the Act if it had construed the word "competition" in its ordinary and natural meaning as intended by Congress. The Commission would have found that the Lehigh Valley Railroad could not perform any service which its boat line could perform; that they were not therefore situated in the same competitive field; that neither could seek for itself what the other desired; that there was therefore no normal, ordinary business competition, and that the Commission was given no jurisdiction to issue an order which would result in depriving the Appellant of the ownership and operation of its Lake Line.

(7) The reason the Commission decided that the Appellant did or might compete with its boat line was on account of the fear that if it did not so decide it could not under the terms of the Act prohibit railroad-owned boats from using the Panama Canal.

One of the reasons why the Lehigh Valley Railroad was ordered by the Commission to cease its ownership of the capital stock of its boat line, the Lehigh Valley Transportation Company, was because the Commission believed that if it did not issue such an order it could not, in subsequent proceedings that might come before it under the act, keep railroad-owned boats out of the Panama Canal.

The Commission thus expressed its fear in this respect at page 707 of its report (Record, pp. 62 and 63):

> "That the existence of paralleling through all-rail routes to which joint through rates are applicable, in which the petitioning railroad participates, is a circumstance bringing any application under this amendment within its provisions, seems clear when the amendment is considered in its application to the railroad ownership of, or interest in, boats operating through the Panama Canal. At the time the amendment became a law, nor now, is there any transcontinental rail line owned or operated by a single railroad or system of railroads in the United States. *If, therefore, the participation of a petitioning railroad in such through route arrangement does not constitute an arrangement by which it is possible for it to compete with its boats operating through the Panama Canal from*

and to common points, then this amendment, as applied to traffic through the Panama Canal, is of no effect."

This report of the Commission is not the only decision in which the same fear of being unable to sustain the prohibitive features of the Panama Canal Act is expressed. Commissioner Clark further elaborated on this opinion in *Southern Pacific Company's Ownership of Oil Steamers*, 34 I. C. C. 77, at page 80, as follows:

> " One of the prime purposes of the Panama Canal act was to prevent a railroad from owning and operating through the Panama Canal any carrier by water with which it does or may compete. If Congress did not intend this provision to include such competition as does or may exist by the owning rail line participating in joint transcontinental rail rates with other carriers, this provision is meaningless, as no railroad or railway system in the United States operates its own line across the continent, and therefore there could be no competition between any rail carrier in the United States and steamers owned by it plying between Atlantic and Pacific ports via the Panama Canal."

The Lehigh Valley Railroad Company in its relation to its lake line differs from any rail line that might by any possibility desire to operate a boat line through the Panama Canal and there was no practical necessity for deciding that there is competition or the possibility thereof between the Lehigh Valley Railroad and its boat line in order to preserve the prohibitive features of the

Act as to traffic through the Canal in railroad owned boats. This is true for the reason that:

> *The Lehigh Valley Railroad Company cannot by any possibility perform any transportation service that its boat line might in whole or in part perform.*

The Lehigh Valley Railroad Company cannot carry a pound of freight to any point its boat line can reach, except the interchange point at Buffalo, neither can it carry a pound of freight over *any part of the journey or distance* which is now or can be traversed by its boat line. However, as to Panama Canal freight, any rail line may transport freight for at least a part of the journey which the same freight is obliged to be transported by such a rail carrier's boat line through the Panama Canal when going from coast to coast and originating at or destined to the same point which is the terminus of the rail carrier owning the boat line. To illustrate: If freight destined to New York City were to originate on the Pacific coast at the western terminus of any existing railroad, this freight could be transported to New York City either by a boat line owned by the railroad company through the Panama Canal, or it could be transported by rail to the eastern end of said railroad and thence by rail connections to New York City. *It is not competition over the same route, but a competition for a part of the distance between origin and destination.* It may therefore be said as to transcontinental traffic which could move through the Panama Canal that the rail line com-

petes with its boat line at least for a portion of the journey. The same is true of freight originating on the Eastern coast of the United States. If an eastern railroad transported freight through the Panama Canal by one of its own boats to a western destination, it might be said to compete with its rail line for that portion of the journey measured by the distance between the eastern and western termini of its rail line. Such a condition cannot exist between the Lehigh Valley Railroad Company's rail line and boat line. Its rail line can by no possibility transport freight over any portion of the distance over which its boat line might also transport the same freight.

Applying the principle referred to above, it can be seen that the granting of the application of the Lehigh Valley Railroad to continue its lake line service will have no effect whatever upon any applications that may come before the Commission from rail lines to be permitted to operate boat lines through the Panama Canal. The test must be,—can the boat line by any possibility perform any portion of the same service which the rail line does or can perform? With this test applied, the granting of the application of the Lehigh Valley Railroad can have no effect whatever upon any applications in reference to water line service through the Panama Canal.

It is therefore respectfully submitted that the fear of the Commission that the prohibitions of the Panama Canal Act could not be enforced if it decided that the Appellant did not or could not

compete with its Lake Line was groundless. There was not the slightest danger of nullifying the Act by recognizing the clear and specific exceptions thereto provided by Congress itself in the terms of the Act.

(8) The order of the Commission prohibiting the Appellant from continuing in the ownership and operation of its Lake Line although negative in form is positive in effect and the Appellant is entitled to an injunction prohibiting the United States and the Interstate Commerce Commission from enforcing the Commission's order.

The District Court expressed doubt that injunction is the proper remedy in the premises. This doubt rests upon the assumption that, since the order of the Commission was negative, simply denying an application made to it by the Appellant, it did not impose positive duties and positive action upon the Appellant. The Court, it is respectfully submitted, erred in its interpretation of the effect of the order of the Commission.

The Act requires the Railroad to cease the operation of its boat line, except upon the permission of the Commission, if it either does or may compete with it. The Act then specifically provides the jurisdiction conferred upon the Commission as follows:

> "Jurisdiction is hereby conferred upon the Interstate Commerce Commission to determine questions of fact as to the competition or the possibility of competition, after full hearing, on the application of any railroad company or other carrier."

The Act further provides that should any carrier not make application "the Commission may on its own motion * * * institute proceedings" to determine the question of competition between a boat line and its rail owner.

The Commission did not await the application of the Appellant but took the initiative and requested the Appellant to make application to it for an order under the Act. The District Court thus outlines the steps leading up to the Appellant's application to the Commission (Record, p. 84):

> "Indeed, the Commission itself had taken the initiative, for in February, 1913, it had sent out a circular to numerous carriers—to the plaintiff among the number—asking for information in reference to water lines, and in the following July the plaintiff had furnished the information requested. In December the Commission called attention to the fact, that it was empowered 'to extend the time beyond July 1, 1914, during which a railroad or other common carrier may continue the operation of service by water, if such service is of advantage to the convenience and commerce of the people, and such extension will neither exclude, prevent, nor reduce, competition on the route by water under consideration'; adding, that it would expect every application for such extension to be filed with the Commission not later than March 1, 1914. Accordingly, on January 21, the plaintiff applied for a hearing on the question, whether competition, or the possibility of competition, existed between itself and its water line; and prayed the Commission to make an order that

the Railroad Company might continue to operate the steamships of the transportation company after July 1, 1914."

The appellant, pursuant to the request of the Commission and in accordance with its right under the Act, petitioned the Commission as follows (Record, pp. 25):

> "Wherefore, your petitioner prays that a full hearing may be had in the premises, as provided by Section 11 of the Act of Congress of August 24, 1912, as to whether the existing services of the said steam vessels, steam tugs, car floats, lighters, barges, canal boats and other vessels hereinabove referred to, would be, from and after July 1, 1914, in violation of the said section, and that such order may be made as the Commission may deem appropriate to the end that the said service by water of the said steam vessels, steam tugs, car floats, lighters, barges, canal boats and other vessels may continue to be operated by your petitioner beyond July 1, 1914, and that the Commission shall grant such other and further relief as the Commission may deem appropriate."

Other railroads owning steamship lines on the Great Lakes filed similar petitions and the Commission, after hearings, filed its report covering all the applications for the continuation of railroad operation on the Great Lakes. The Report of the Commission ends as follows (Record, p. 74):

> "The application of each of the petitioners herein is therefore denied, effective December 1, 1915. An order will be entered accordingly."

The following order, the names and docket numbers of carriers other than the Appellant being omitted was then issued (Record, p. 74):

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of May, A. D. 1915.

LAKE LINE APPLICATIONS UNDER PANAMA CANAL ACT.

No. 6504

LEHIGH VALLEY RAILROAD COMPANY (LEHIGH VALLEY TRANSPORTATION COMPANY; LAKE LINE ONLY).

It appearing, That * * * Lehigh Valley Railroad Company, * * * have separately filed applications under Section 5 of the Act to Regulate Commerce, as amended by Section 11 of the Panama Canal Act, seeking authority to continue their interest in, and to operate beyond July 1, 1914, certain boat lines operating on the Great Lakes, as described in the report of the Commission herein:

It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the applications of each of the petitioners in these proceedings be, and they are hereby, denied, effective December 1, 1915.

By the Commission:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

The effective date of this order was afterwards extended to December 15, 1915.

The question now arises as to whether this negative "order" denying the application of the Appellant is, under the law, a proper basis for an injunction. The Commission had said that the Appellant did or might compete with its boat line on the Great Lakes and had issued the "order" it was required to issue upon its findings. What did this order require the Appellant to do? The District Court suggests that it required it to do nothing. The learned Court thus expressed its opinion in this respect (Record, p. 105):

> "The plaintiff seems to suppose that the Commission has authority to order an offending carrier to divorce itself from the carrier by water; and, indeed, it seems to suppose also that the order of May 9, 1915, is at least the equivalent of such a command. We do not so understand the situation. Whatever advice on this subject the Commission may have seen proper to give, either expressly or by implication, what the Commission has actually done is merely to refuse to act; it has declined to suspend the operation of the statute in the plaintiff's favor. No order of divorcement or any other affirmative command has been issued; the order complained of is purely negative, and nothing else is before us."

It is respectfully submitted that Section 5 of the Act itself shows that the District Court erred in its analysis. The provision of the Act forbidding

the Appellant to own and operate its boat line if it did or could compete with it is only enforceable after the Commission has made an "order". The last paragraph of Section 5 as amended by the Panama Canal Act provides for its enforcement in the same manner and by the same penalties as are provided for the enforcement of orders made under Section 15 of the Act. Section 15 depends upon the provisions of Section 16 which are as follows in this respect:

> "Any carrier, any person, representative or agent of a carrier * * * who knowingly fails or neglects to obey any order made under the provisions of Section 15 of this act shall forfeit to the United States the sum of five thousand dollars for each offence. Every distinct violation shall be a separate offence, and in case of a continuing violation, each day shall be deemed a separate offence."

The Appellant was not prohibited from owning and operating its Lake Line until the Commission had made an "order". The Attorney General could only prosecute the Appellant for violating an "order" of the Commission made against the Appellant after full hearing. The Commission made such an order and the Appellant by virtue of this order and this alone must either—

(*a*) Tie up its boats or sell them, cancel its lake and rail tariffs, discharge its Lake Line employees, cancel leases for lake terminals and take such action as might be necessary to adjust its financial relations

with the Lehigh Valley Transportation Company, or

(*b*) Continue to operate its Lake Line and subject itself to a penalty of $5,000 per day for each boat operated.

It is respectfully submitted that this Court has refused to lend its support to a theory that a negative order of the Commission requiring a positive readjustment of transportation relationship, is, because of its mere form final and not subject to the jurisdiction of a Court of Equity. The jurisdiction of the Court to grant the Appellant relief by injunction is precisely the same in the case at bar as in the *Intermountain Rate Cases*, 234 U. S. 426. The Intermountain Rate Cases arose from the refusal of the Commission to approve rates filed by a number of railroads under the Fourth Section of the Interstate Commerce Act. The wording of the Fourth Section and of the Panama Canal Act are practically the same in respect of the manner in which the prohibitions are expressed. The following parallel columns show this similarity:

Fourth Section.	Panama Canal Act, Section 5.
"That it shall be unlawful for any Common Carrier * * * to charge or receive any greater compensation", etc.	"* * * It shall be unlawful for any railroad company * * * to own, lease, operate, control", etc.

"Provided, that upon application to the Interstate Commerce Commission such common carrier may in special cases be authorized by the Commission to charge less for longer than shorter distances", etc.

"Jurisdiction is hereby conferred upon the Commission to determine questions of fact as to competition or possibility of competition after full hearing on the application of any railroad company or other carrier."

In the Intermountain Rate Cases (*supra*) the railroads made applications just as the Appellant did under the Panama Canal Act. In each instance, if the Commission denied or dismissed the application, it must do so by an order. The order denying or dismissing is enforceable by a penalty of $5,000 per day under Section 16 of the Act. The orders in both instances were, in part, as follows:

FOURTH SECTION, Order.

"That those portions of the above numbered applications that request authority to maintain higher commodity rates from points in Zone No. 1, to intermediate points than to Pacific Coast terminals, *be, and the same are hereby denied, effective Nov. 15, 1911*" (See Intermountain Rate Cases, 234 U. S. 476, at pp. 493).

PANAMA CANAL ACT, Order.

"It is ordered, That the applications of each of the petitioners in these proceedings *be, and they are hereby denied, effective Dec. 1, 1915*" (Record, p. 75).

The injunction sought in the Intermountain cases was to prohibit the enforcement of the order of the Commission in precisely the same manner as the Appellant seeks in the case at bar. In the Intermountain cases the Commerce Court issued writs to enjoin the enforcement of the Commission's orders without giving careful consideration to the fact, at least in its opinion, that the order was stated in the negative. The case was ultimately appealed to the United States Supreme Court, and particular stress was laid upon the principle that the court had no jurisdiction over a purely negative order under the Fourth Section. The Supreme Court answered this contention in the following words (at p. 490):

> " The second contention as to jurisdiction yet further affords an illustration of the same mental attitude, since it rests upon the assumption that the order of the Commission refusing to grant the request of the carrier made under the fourth section was purely negative and hence was not subject to judicial inquiry. The contention therefore presupposes that the power which from the beginning has been the subject of judicial review by the mere fact of its transfer to the Commission was made arbitrary. Besides, the proposition disregards the fact that the right to petition the Commission conferred by the statute is positive and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative, since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist."

It is respectfully submitted that injunction is not only the proper remedy in this case, but it is the only remedy the Appellant has under the Statutes. The denial of the Appellant's application by the order of the Commission requires positive and imperative acts of compliance on the part of the Complainant, and injunction against the enforcement of this order is the proper remedy for the Appellant to seek.

(9) The finding of the Commission that there is competition or the possibility thereof between the Appellant and its Lake Line is a conclusion of law based upon the facts found by the Commission and is reviewable by the Court.

The District Court in dismissing the Appellant's bill for an injunction held that the finding of the Commission that the Appellant does or may compete with its Lake Line is a finding of an ultimate fact which is not reviewable by the courts. The court thus expressed its opinion in this respect (Record, p. 107):

> "Now the finding, that the plaintiff does or may compete for traffic with its boat line, is the finding of an ultimate fact, exactly as the finding of discrimination was decided to be in *Meeker* vs. *Railroad Co.* (236 U. S. 427); and the only question that remains is whether such a finding was made without evidence, or by disregarding the the evidence plainly and arbitrarily. In view of the

full reports of the Commission the subject need not be discussed."

The court prefaced its opinion outlined above by the following observations upon the finality of the Commission's conclusions (Record, p. 106):

> "Its (the Commission's) findings are made final, and final they must remain, but with one qualification—certain fundamental rules must have been obeyed. In spite of the statutory declaration of finality, the court still retain a limited power of supervision—enough to see that constitutional requirements have been observed. *Intermountain Rate Cases*, 234 U. S. 490; *U. S.* v. *R. R.*, 235 U. S. 320. There must have been a hearing, with the essentials involved in that word, and the action of the Commission must not have been arbitrary; but in other respects we have no right to review what has been done, or the manner of doing it. We cannot substitute our judgment for the judgment of the Commission on the weight or the effect of the evidence, or correct mistakes that may have entered into the findings of fact."

It is respectfully submitted that the Commission itself did not entertain the view that all its findings, including that of the existence of competition or the possibility thereof between the Appellant and its Lake Line, were "findings of fact" and not "conclusions of law". The Commission thus dif-

ferentiated between its "findings of fact" and "conclusions thereon" in its order (Record, p. 75):

> "It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its *findings of fact* and *conclusions thereon.*"

The Commission therefore recognized that it had performed a two-fold service in its report: it had set out its "findings of fact", which were not reviewable by any court, and also its "conclusions thereon", which were conclusions of law and were reviewable.

It required no statutory interpretation or the application of any legal principles for the Commission to determine that the Appellant had in effect through routes and joint rates with its rail connections west of Buffalo. This is a finding of fact and is not reviewable. It required no legal inferences for the Commission to determine that the Lehigh Valley Railroad was a member of the Trunk Line Association, or that the Lehigh Valley Railroad's Lake Line was a member of the Lake Line Association. These were determinations of fact and are not reviewable. When, however, the Commission came to the conclusion that these facts constitute, in law, the "competition" contemplated by the terms of the Act between the Appellant and its Lake Line, it found no fact, but decided a question of law, and this conclusion of law is reviewable.

The Supreme Court early affirmed the principle of review by the courts of questions of law decided by the Commission and based upon determinations of fact. In *Louisville, etc., R. R. Co.* v. *Behlmer*, 175 U. S. 648, in a case involving the Fourth Section of the Act to Regulate Commerce as it stood at that time, the Commission had decided a large number of facts in reference to the relationship between the Louisville & Nashville Railroad and other carriers and had concluded from these facts that the various railroads concerned constituted under the law a "continuous line", bringing them within the control of the Act to Regulate Commerce.

The Supreme Court thus stated, at page 662, the facts determined by the Commission and the question of law involved in the Commission's conclusion therefrom:

> "The conceded facts from which it was deduced as a matter of law that the carriers were operating 'under a common control, management or arrangement for a continuous carriage or shipment' were as follows: The several carriers transported hay from Memphis under through bills of lading, by continuous carriage, to Summerville and Charleston. The several roads shared in an agreed rate on traffic to Charleston and in a precisely equal in amount rate on traffic to Summerville. On shipments to Summerville, however, there was added to the Charleston rate the amount of the local rate from Charleston to Summerville, the benefit of which additional exaction was solely received

by the local road on which Summerville was situated. The contention that under this state of facts the carriers did not constitute a continuous line, bringing them within the control of the Act to regulate Commerce, is no longer open to controversy in this court. In *Cin., N. O. & Texas Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 184, decided since the case in hand was before the Commission and the Circuit Court, it was held under a state of facts substantially similar to that here found that the carriers were thereby subject to the Act to regulate Commerce."

In *Interstate Commerce Commission* v. *Alabama Midland Railway Co.*, 168 U. S. 144, this Court reviewed the Commission's interpretation of the following words of the Fourth Section: "Substantially similar circumstances and conditions", and decided that the Commission's decision was an erroneous construction of these words of the Act.

In *Interstate Commerce Commission* v. *Northern Pacific Railway*, 216 U. S. 538, Section 4 of the Act to regulate Commerce was again before the Court, and the provision thereof giving the Commission power to establish through routes and joint rates "where no reasonable or satisfactory through route exists" was before the court for interpretation. The Commission found a large number of facts and interpreted these facts to mean that a reasonable and satisfactory through route already existed. It was contended that this

was a finding of fact and was not reviewable by the courts. The Supreme Court, in an opinion by Mr. Justice Holmes, again differentiated between questions of fact not reviewable by courts and questions of law and statutory interpretation which are reviewable by the courts. The court thus analyzed the distinction between questions of fact involved in this case and questions of law, at page 544:

> "We are of opinion then that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existance of such a route may be inquired into by the courts. How far the courts should go in that inquiry we need not now decide. No doubt in complex and delicate cases great weight at least would be attached to the judgment of the Commission. But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for a view of *the law upon which this court must pass.*"

It is not necessary to refer to the long line of cases in which this court has distinguished between "findings of fact" and "conclusions of law". The recent decision of the court in the *Tap Line Cases*, 234 U. S. 1, at page 26, clearly emphasizes the former decisions of the court in this respect. The Commission had in the Tap Line cases decided a large number of facts which

were not disputed by the parties when the proceedings were brought before the court. The Commission, had, however, interpreted the legal expression "common carrier" and had deduced from its findings of fact that certain of the so-called tap lines were not common carriers. This court did not review the findings of fact made by the Commission, but decided that upon its findings of fact, the Commission's legal conclusion that the tap lines were not "common carriers" was unwaranted in law.

A recent case, *Louisville & Nashville R. R. Co.* v. *United States* (238 U. S. 1) known as the Nashville Switching Case, is in every respect authority for the review by this Court of the legal findings of the Commission upon the undisputed findings of fact from which the Commission's legal conclusions were drawn. In that case the record containing the testimony and exhibits produced before the Commission was not printed and brought before the court. This court thus commented, at page 10, upon the manner in which the case was presented to the Court upon the undisputed facts found by the Commission:

> "The facts involved have been so fully stated by the Commission (28 I. C. C. 533) and by the court below (216 Fed. Rep. 672) that it is unnecessary here to repeat them. The Railroad Companies did not offer all of the evidence which was considered by the Commission; and on this appeal they do not include in the record all of the hundreds of pages of testimony which had been submit-

ted to the Commission, but—conceding that the evidence was conflicting and tended to support the findings of the Commission—they insist that the facts found were insufficient in law to sustain the orders which were made. This most commendable practice not only saved the expense of printing many volumes of testimony, but saved the substantial points in the case from being submerged in a flood of testimony—much of which was explanatory before the Commission and most of which was wholly immaterial in an Appellate Court which cannot reverse findings when supported by substantial—though conflicting—evidence. The practice is also in compliance with the spirit of the new Equity Rules (75, 76, 77) which call for just such a winnowing out of the useless; the presentation of only the relevant parts of exhibits, documents, tables, and reports; the elimination of all reduplications in written and oral testimony and a condensation into narrative form of what is material to the then issue before the court."

The manner in which the court proceeded to review the questions of law arising from the determinations of fact made by the Commission is outlined on page 11 of the court's opinion, as follows:

> "By virtue of this conformity to the rules, we are in a position to consider the sharp-cut issue as to whether, as matter of law, the Commission's findings of fact sustain its order, and shall discuss first the rate on coal which, being treated as typical, was principally argued by counsel."

It is respectfully submitted that there could scarcely be a clearer line of demarcation between the questions of fact decided by the Commission and the conclusions of law based thereon than in the case at bar. The facts are before the court in the precise manner in which the Commission itself determined them, and they are unchallenged. The court is asked to review a conclusion of law made by the Commission, which conclusion involves the interpretation of a statute, and it is submitted that such a conclusion has at all times, and is now, reviewable by this court.

IV. Conclusions.

It is respectfully submitted that it has been fully established that the prayer of the Appellant's bill for an injunction against the enforcement of the order of the Interstate Commerce Commission denying it the privilege of continuing in the ownership and operation of its Lake Line should be granted, for the following reasons:

(1) The Commission's determinations of fact as to competition or the possibility thereof between the Appellant and its Lake Line indicate in themselves that under the terms of the Act the Commission was given no power by Congress to deny the Appellant's petition to continue in the ownership and operation of its Lake Line.

(2) The evil sought to be remedied by the Panama Canal Act was the injury Congress thought was done to private enterprise on the waterways of the country by the operation of water lines owned by railroads and paralleling their rail owners and competing therewith. Congress did not consider as an evil and did not include in the act a prohibition against the ownership by a rail line of a water line extension with which the rail owner could not compete.

(3) The Commission's conclusions of law based upon its determinations of fact to the effect that there is competition between the Appellant and its Lake Line indicates that the Commission's interpretation of the word "competition" as found in the Act is not the natural and ordinary meaning of the word as intended by Congress, but a strained and unnatural meaning which enlarges and makes more inclusive the prohibitions of the Act than Congress intended them to be.

(4) The Commission's decision that the Appellant competes with its Lake Line on account of the existence of through routes and joint rates between the Appellant and its all rail connections west of Buffalo nullifies the specific exception provided by Congress and enlarges the Act so that under the decision of the Commission the Act prohibits all railroad ownership of water lines in the United States.

(5) The order of the Commission denying the Appellant's petition to allow it to continue in the

ownership and operation of its Lake Line although negative in form is positive in effect and the Appellant is entitled to an injunction against the enforcement thereof.

(6) The finding of the Commission that there is competition or the possibility thereof between the Appellant and its Lake Line is a conclusion of law based upon the facts determined by the Commission and is reviewable by the court.

The decree of the District Court should therefore be reversed.

All of which is respectfully submitted.

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Of Counsel.

Appendix.

WATER LINE DECISIONS

OF THE

INTERSTATE COMMERCE COMMISSION UNDER THE PANAMA CANAL ACT.

Cases in which the Commission decided there was no competition between rail line and boat line.

LAKE TAHOE RAILWAY'S BOAT LINE CASE, CALIFORNIA, 33 I. C. C. 426, DECIDED MARCH 22, 1915.

The petitioner was a narrow gauge railroad to a summer resort. The Railroad operated a boat on Lake Tahoe and had no through routes or joint rates with other rail lines. The Commission decided that there was no competition or possibility of competition between the boat line and its rail owner "so long as their respective operations remain as at present".

SOUTHERN PACIFIC COMPANY'S OWNERSHIP OF SCHOONER "PASADENA", 33 I. C. C. 476, MARCH 30, 1915.

The Commission decided that so long as none of the railroads with which the Southern Pacific had joint rates had rail connections with the terminus of the route of this schooner there would be no competition between the boat and its rail owner.

GEORGIA, FLORIDA & ALABAMA RAILROAD COMPANY'S APPLICATION, 33 I. C. C. 632, APRIL 27, 1915.

This railroad is 182 miles long and operates between Richland, Ga., and Carrabelle, Fla. The steamboat owned by the Railroad operates on the river 32 miles from Carrabelle to Apalachicola, Fla. The Commission found that the railroad had no through routes and joint rates with any other rail line reaching Apalachicola, and held that as long as their respective operations remained the same the boat line and rail line did not and could not compete for traffic.

ERIE RAILROAD COMPANY'S BOAT LINE ON LAKE KEUKA, N. Y., 34 I. C. C. 212, MAY 29, 1915.

The Commission decided that there was no competition between the Erie and its boat line because its rails did not serve the towns located on Lake Keuka in common with its boats, nor did it join in through rates with other carriers reaching these towns.

Cases in which the Commission found there was competition or the possibility thereof between water lines and their rail owners.

SOUTHERN PACIFIC COMPANY'S OWNERSHIP OF PACIFIC MAIL STEAMSHIP COMPANY, 32 I. C. C. 690, FEBRUARY 1, 1915.

This is the first case under the Panama Canal Act. The Commission considered coastwise traffic of the Steamship Company between points

in the United States, traffic between San Francisco and ports on the coast of Mexico and Central America, and traffic between San Francisco and foreign countries in Europe, Asia, etc. The Commission held that there was competition between the Southern Pacific and its water lines to all the destinations mentioned.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY'S APPLICATION, 33 I. C. C. 463, MARCH 22, 1915.

The railroad follows the Columbia River 230 miles and has a boat line 95 miles of this distance. Held that the rail line and boat line compete and that the operation of the boat line must cease June 1, 1915, as its operation was not in the interest of the public.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY'S OWNERSHIP OF BOATS ON WILLIAMETTE RIVER, 33 I. C. C. 658, APRIL 27, 1915.

The Railroad operated three boat lines: One on the Snake River, one on Lake Cœur d'Alene and one on the Columbia and Williamette Rivers. The Commission held that there was competition between the Railroad and all of them. Railroad operation was allowed to continue on account of public convenience.

LAKE LINE CASES, 33 I. C. C. 699, MAY 7, 1915. (See Record in case at bar.)

THE PENNSYLVANIA-ONTARIO COMPANY'S CAR FERRY, 34 I. C. C. 47, APRIL 29, 1915.

Car Ferry between Ashtabula, O. and Port Burwell, Canada, owned by the Pennsylvania Railroad and the Canadian Pacific. The Commission held that there was competiton on account of through routes and joint rates between the rail owners and other rail lines, but that railroad operation should continue on account of public convenience.

GRAND TRUNK RAILWAY'S CAR FERRY, 34 I. C. C. C. 49, APRIL 29, 1915.

Car Ferry from Genesee Dock, N. Y. to Cobourg, Ont. Held that the Grand Trunk was in competition with its car ferry on account of through routes and joint rates with other rail lines, but that railroad operation should be continued on account of public convenience.

B. R. & P. CAR FERRY APPLICATION, 34 I. C. C. C. 52, APRIL 29, 1915.

The B. R. & P. Railroad was part owner of the Grand Trunk's car ferry operating between Genesee Dock, N. Y., and Cobourg, Ont. Held the car ferry was in competition with the B. R. & P., although there were no paralleling rails, on account of the B. R. & P.'s through routes and joint rates with all-rail lines, but that railroad operation should be continued for the benefit of the public.

GRAND TRUNK WESTERN CAR FERRY, 34 I. C. C. 54, APRIL 29, 1915.

The Grand Trunk Western Railroad operated a car ferry between Grand Haven, Michigan, and Milwaukee, Wisconsin, and it was held that the railroad competed with its ferry on account of through routes and joint rates with other rail lines, although it did not reach Milwaukee. Existing service held to be operated in the interest of the public and allowed to continue.

SOUTHERN PACIFIC COMPANY'S OIL STEAMERS, 34 I. C. C. 77, MAY 7, 1915. SEE SAME CASE, 37 I. C. C. 528, JANUARY 3, 1916.

The Southern Pacific Company operated oil steamers from Monterey, Cal., to points in Oregon, Washington, Alaska and Hawaii. The Commission held that there was no competition or possiblity of competition between the Southern Pacific and its boat lines to Alaska or Hawaii, but that there was competition to points in Oregon and Washington on account of through routes and joint rates the Southern Pacific had in effect with other railroads reached by its steamers. The Commission later held that there was no "substantial" competition. See 37 I. C. C. 528.

ANN ARBOR RAILROAD COMPANY'S CAR FERRIES, 34 I. C. C. 83, MAY 11, 1915.

The Ann Arbor Railroad operated a car ferry from Frankfort, Mich., to Manistique, Mich. The Commission held that the railroad competed with

its car ferry by through routes and joint rates with other rail lines. Railroad operation allowed to continue on account of benefit to public.

PERE MARQUETTE AND BESSEMER & LAKE ERIE CAR FERRY BOATS, 34 I. C. C. 86, MAY 11, 1915.

These two companies operate car ferries over the Detroit River between Detroit, Mich., and Windsor, Ont., and also from Ludington, Mich., to Milwaukee, Manitowoc, and other places on the west shore of Lake Michigan. The Commission held that both railroads compete with their car ferries because of through routes and joint rates with other roads. Continued railroad operation allowed for public convenience.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY'S OWNERSHIP OF SAN FRANCISCO AND PORTLAND STEAMSHIPS, 34 I. C. C. 165, MAY 25, 1915.

The Commission held that these steamships compete with the Railroad Company on account of the fact that the railroad has through routes and joint rates between Portland and San Francisco and other points in California by way of connecting railroads. Railroad operation allowed to continue for benefit of public.

SOUTHERN PACIFIC COMPANY'S STEAMBOATS ON THE SACRAMENTO RIVER, 34 I. C. C. 174, MAY 25, 1915.

The Southern Pacific Company operated a line of steamboats on the Sacramento River, Califor-

nia. The Commission held that they competed with the railroad on account of through routes and joint rates between the railroad and other rail lines. Continued railroad operation allowed because in interest of the public.

ERIE RAILROAD COMPANY'S APPLICATION FOR CHICAGO RIVER SERVICE, 34 I. C. C. 218, MAY 29, 1915.

The Commission held that the Erie Railroad competed with its own river service by through routes and joint rates with rail lines, but railroad operation was allowed to continue for the benefit of the public.

DULUTH, SOUTH SHORE & ATLANTIC APPLICATION FOR FERRIES ON MACKINAC STRAITS, 34 I. C. C. 229, MAY 29, 1915.

This was an application by three railroads, the Grand Rapids & Indiana, the Michigan Central and the Duluth, South Shore & Atlantic, as owners of the Mackinac Straits ferry. Held that none of the roads owned or controlled paralleling lines, but that by very roundabout routes they had in all-rail routes and joint rates with other rail lines, and that as these routes were very circuitous the probability of actual competition was very remote. It was held that there was potential competition between all the railroads and their car ferries but that the railroad operation should continue for the benefit of the public.

SOUTHERN PACIFIC STEAMBOATS ON SACRAMENTO RIVER. SECOND CASE. 34 I. C. C. 648, JULY 2, 1915.

The Commission held that all boats of the Southern Pacific Company were in competition with the railroad, but allowed the continuation of railroad ownership on the ground of public convenience.

PENNSYLVANIA RAILROAD STEAMER "ALLIANCE" ON CHESAPEAKE BAY, 35 I. C. C. 692, JULY 30, 1915.

The Commission held that substantial competition existed on the eastern, but not on the western, shore of Chesapeake Bay between the steamer lines and their rail owner. It also held that there was a possibility of competition between the water lines and their rail owners on the western shore. Rail operation of all water lines at first refused but later continued on account of public convenience.

STEAMSHIP "GREAT NORTHERN", 37 I. C. C. 260, DECEMBER 24, 1915.

The Commission held that the Northern Pacific and Great Northern Railroads compete with steamers operating between Flavel, Oregon, and San Francisco, but that it is in the interest of the public for railroad operation to continue.

OCEAN STEAMSHIP COMPANY OF SAVANNAH—APPLICATION OF THE CENTRAL OF GEORGIA AND ILLINOIS CENTRAL, 37 I. C. C. 422, DECEMBER 23, 1915.

The steamships covered by this application operate between Savannah, Ga. and Boston, Mass. and New York City. The Commission held that both the Central of Georgia and the Illinois Central compete with these steamship lines. It was also held that continued railroad operation would be in the interest of the public.

PENINSULAR & OCCIDENTAL STEAMSHIP COMPANY —FLORIDA EAST COAST'S AND ATLANTIC COAST LINE'S APPLICATION, 37 I. C. C. 432, DECEMBER 23, 1915.

This steamship line operates between Miami Fla., and the Bahamas; between Key West, Fla. and Havana, Cuba; between Port Tampa, Fla., and Havana, Cuba. The Commission held that these railroads compete with the steamship lines, but that continued railroad operation is in the interest of the public.

STEAMER "H. B. PLANT", 37 I. C. C. 453, DECEMBER 23, 1915.

This was the Atlantic Coast Line's application. The steamer *H. B. Plant* operates between certain points in Florida. The Commission held that the Atlantic Coast Line competed with it on account of through routes and joint rates with other rail lines. Continued railroad operation was allowed on account of public interest.

MAINE CENTRAL BOAT LINES, 40 I. C. C. 272, JUNE 22, 1916.

This application covered the operation of the Maine Central's boats to Bar Harbor and other Summer resorts. The applicant admitted the jurisdiction of the Commission. Railroad operation was allowed to continue on account of public convenience.

DELAWARE & HUDSON BOAT LINES, 40 I. C. C. 297, JUNE 22, 1916.

The Commission held that the D. & H. boat lines on Lake George and Lake Champlain were in competition with the rail owner but that railroad operation could continue on account of public convenience.

BOSTON & MAINE BOAT LINES, 40 I. C. C. 565, JULY 3, 1916.

This was a petition for the privilege of operating steamers during the Summer season on two New Hampshire lakes. The Commission held that the boats competed with their rail owner but allowed their continued railroad operation on the ground of public convenience.

CENTRAL VERMONT BOAT LINES, 40 I. C. C. 589, JULY 5, 1916.

This was an application to continue railroad operated boats in service between New York and New London, Conn. The Commission held that

the water line competed with its rail owner but allowed the continuance of rail operation because of public convenience.

STEAMER LINES NORFOLK TO BALTIMORE, NEW YORK AND RICHMOND. SOUTHERN RAILWAY, CHESAPEAKE & OHIO RAILROAD, NORFOLK & WESTERN, SEABOARD AIR LINE AND ATLANTIC COAST LINE APPLICATION, 41 I. C. C. 285, JUNE 29, 1916.

This application covered the coastwise service of the ocean and rail differential lines. The Commission held that all the applicants competed with their boat lines but allowed all except the Norfolk & Western to continue in railroad ownership on the ground of public convenience.

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The Panama Canal Act prohibited the ownership and operation by railroads after July 1, 1914, of water lines with which they do or may compete for traffic. The act further provided, however, that the Commission might extend such period of operation in any case in which it should conclude, after investigation, that such water service, other than through the Panama Canal, "is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water." The appellant applied to the Commission under this provision of the statute for authority to continue its operation of certain vessels plying on the Great Lakes between Buffalo, New York, and points in Wisconsin and Illinois. The Commission found upon investigation that such an extension would not be justified and accordingly denied the application. The appellant thereupon applied to the District Court of the United States for the Eastern District of Pennsylvania, for an injunction against the Commission's order, but its petition was dismissed, and from the decree of dismissal it has appealed.

QUESTIONS INVOLVED 7

1. **Did the jurisdiction of the district court extend to the issuance of an injunction to restrain the Commission's order of May 7, 1915, denying the application of the appellant for authority to continue the ownership and operation of its lake line service?**
2. **Was the order of the Commission void as based upon a finding that the Appellant's rail lines were in actual or potential competition with its lake line service?**

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The statute was designed to insure the untrammeled use of the Great Lakes as a natural highway for water-borne traffic, and the order of the Commission was in the furtherance of that purpose. The Commission's order, moreover, was supported by substantial evidence, and its conclusion, as to competition or the possibility of competition, was a conclusion of fact that was not reviewable by the district court. The decree of the district court dismissing the petition for injunction, and sustaining the order of the Commission, should be affirmed, and the temporary injunction should be dissolved.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

LEHIGH VALLEY RAILROAD COMPANY, appellant,
v.
UNITED STATES OF AMERICA, APPELLEE, and Interstate Commerce Commission, intervener.
No. 733.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court of the United States for the Eastern District of Pennsylvania, dismissing a petition filed by the Lehigh Valley Railroad Company, hereinafter called the appellant, to restrain the enforcement of an order of the Interstate Commerce Commission. *Lehigh Valley R. Co.* v. *United States*, 234 Fed. 682. The Commission by that order had denied an application submitted by the appellant, under the Panama Canal Amendment

to section 5 of the act to regulate commerce, for authority to continue the operation of certain vessels plying on the Great Lakes between Buffalo, N. Y., Manitowoc and Milwaukee, Wis., and Chicago, Ill. The facts and circumstances in connection with which the order had been entered were as follows:

The appellant, a corporation organized under the laws of Pennsylvania, owns and operates a line of railroad between Jersey City, N. J., and Buffalo, N. Y. Its rails do not extend west of Buffalo, but it participates in through routes and joint rates with other rail lines reaching Manitowoc, Milwaukee, and Chicago. It also owns the capital stock of the Lehigh Valley Transportation Company, hereinafter called the lake line, a corporation organized under the laws of New Jersey, and operating on the Great Lakes between Buffalo, Manitowoc, Milwaukee, and Chicago.

Section 5 of the act to regulate commerce, as amended by section 11 of the act of August 24, 1912, commonly known and hereinafter referred to as the Panama Canal Act, 37 Stat. L. 566–567, provides that:

> From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated

through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the

> interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen.

Pursuant to a circular issued by the Commission directing the attention of the carriers to the foregoing provisions of the statute, Record, p. 7, the appellant filed with the Commission a petition, Record, pp. 22, 25, praying for a hearing on the question as to whether or not its operation, after July 1, 1914, of its lake line service, would be in violation of the statute, and—

> that such order may be made as the Commission may deem appropriate to the end that the said service by water of the said steam vessels, steam tugs, car floats, lighters, barges, canal boats, and other vessels may continue to be operated by your petitioner beyond July 1, 1914, and that the Commission shall grant such other and further relief as the Commission may deem appropriate.

After full hearing on this application, together with the applications of other carriers operating boat lines on the Great Lakes, the Commission on May 7, 1915, announced its findings that the appellant's rail line did or might compete with its lake line service; that the lake line was not being operated in the interest of the public and was not of advantage

to the convenience and commerce of the people; and that a continuance thereof would prevent, exclude, and reduce competition on the Great Lakes. *Lake Line Applications under the Panama Canal Act*, 33 I. C. C. 699. In pursuance of those findings, the Commission entered an order, Record, pp. 9–11, in material part, as follows:

> It appearing that the Pennsylvania Railroad Co., Northern Central Railway Co., Lehigh Valley Railroad Co. * * * have separately filed applications under section 5 of the act to regulate commerce as amended by section 11 of the Panama Canal Act, seeking authority to continue their interest in, and to operate beyond July 1, 1914, certain boat lines operating on the Great Lakes, as described in the report of the Commission herein;
>
> It further appearing that a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a report thereof:
>
> It is ordered, That the applications of each of the petitioners in these proceedings be, and they are hereby, denied, effective December 1, 1915.

On September 17, 1915, the appellant filed with the Commission a petition for rehearing on the single question as to whether or not, within the pur-

view of the Panama Canal Act, there was in fact competition or the possibility of competition between the appellant and its lake line service.

After reargument on this question, the petition for rehearing was dismissed by the Commission December 13, 1915. *Lake Line Applications under the Panama Canal Act, Lehigh Valley Railroad Company (Lehigh Valley Transportation Company; Lake Line only)*, 37 I. C. C. 77.

The appellant thereupon filed in the District Court of the United States for the Eastern District of Pennsylvania a petition to restrain the enforcement of the Commission's order of May 7, 1915.

In support of its petition for injunction the appellant introduced the original and supplemental reports and orders of the Commission, but not the record before the Commission, in the *Lake Line Cases*, 33 I. C. C., 699; 37 I. C. C. 77. And, while tacitly admitting that the findings of evidential facts set forth in the reports of the Commission were supported by substantial evidence, the appellant contended that those facts, even if true, did not justify the Commission in concluding that the appellant "does or may compete for traffic" with the lake line. Appellant further contended before the district court that the Panama Canal Act is unconstitutional as involving an unlawful delegation of legislative power.

After a preliminary hearing on February 12, 1916, before Circuit Judges Buffington, McPherson, and

Woolley, sitting as the District Court of the United States for the Eastern District of Pennsylvania, an interlocutory decree was entered, restraining the order of the Commission pending a hearing on the merits. The case was finally argued, submitted, and taken under advisement March 17, 1916, and on August 24, 1916, an injunction was denied and a final decree was entered dismissing the petition. The restraining order previously granted, however, was restored and continued in force pending a determination by this court of the questions here submitted on appeal.

QUESTIONS INVOLVED.

The issues presented by the appellant's specifications of error are reducible to the following questions:

1. Did the jurisdiction of the district court extend to the issuance of an injunction to restrain the Commission's order of May 7, 1915, denying the application of the appellant for authority to continue the ownership and operation of its lake line service?
2. Was the order of the Commission void as based upon a finding that the appellant's rail lines were in actual or potential competition with its lake line service?

These questions will be considered in their order.

ARGUMENT.

I.

THE ORDER OF THE COMMISSION DENYING THE APPLICATION OF THE APPELLANT WAS NOT SUBJECT TO INJUNCTION BY THE DISTRICT COURT.

A. The order in question was a negative order and as such might not lawfully have been enjoined.

1. *Source and limitation of judicial power over orders of Commission.*—The act creating the Commerce Court invested it with jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." 36 Stat. L. 1148.

The District Court Jurisdiction Act of October 22, 1913, 38 Stat. L. 219–220, abolishing the Commerce Court and transferring its jurisdiction to the district courts of the United States, provided that:

> The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be the same as that heretofore prevailing in the Commerce Court.

It is therefore apparent that the district courts have no jurisdiction with respect to an order of the Commission which might not have been lawfully exercised by the Commerce Court before its abolition. It is further apparent that the definition of the term *order*, as used by this court in cases under the Commerce Court Act, is likewise determinative of the scope and meaning of the word as used in the act defining the jurisdiction of the district courts.

In *Procter & Gamble* v. *United States*, 225 U. S. 282, it was held that an order of the Commission dismissing a complaint was not such an order as was contemplated by the act conferring jurisdiction upon the Commerce Court to set aside "any order of the Interstate Commerce Commission." Referring to the words last quoted it was said, pp. 293–294:

> Giving to these words their natural significance we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance when properly made of complaints concerning the legality of orders, rendered by the Commission, and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal. * * * Thus, the first subdivision provides for the enforcement of orders; that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission, and the second * * * provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph. In other words, by the cooperation of the two paragraphs, authority is given on the one hand to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order.

In other words, the injunctive power of the Commerce Court was limited in its application to orders of the Commission requiring parties to do or to refrain from doing a particular thing, and the powers of the district courts are similarly restricted.

2. *No requirement or inhibition prescribed in order under consideration.*—The Panama Canal Act prohibits the ownership or operation by any railroad, after July 1, 1914, of any boat line, operated through the Panama Canal or elsewhere, with which the railroad does or may compete for traffic. The jurisdiction of the Commission, under the act, is limited to a determination of certain facts as to competition or the possibility of competition, and to an extension, after July 1, 1914, of the period during which any existing specified service by water other than through the Panama Canal may continue to be operated, if the Commission shall be of opinion that such service (1) is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and (2) that such extension will neither exclude, prevent, nor reduce competition *on the route by water*. The Commission's denial of the appellant's application was not only justified by, but was the inevitable consequence of, its finding that the rail line of the appellant does or may compete with the lake line.

The Panama Canal Act makes no provision for an *affirmative* order by the Commission requiring that the lake line be divorced from the appellant, and no

such requirement or inhibition was prescribed by the Commission. The statute itself made continued ownership or operation unlawful after the fact of competition had been found by the Commission.

If the appellant desired to continue the operation of the lake line, it should have sought to restrain the enforcement of the statute, not to enjoin the order of the Commission which commanded nothing, restrained nothing, and was therefore susceptible of neither violation nor enforcement. The district court aptly said in this connection, Record, pp. 104, 105:

> We think it important to observe precisely what Congress has done. Essentially, the act ordains that after July 1, 1914, common interest of a certain kind between two classes of carriers shall be unlawful, but it does not declare how such common interest shall come to an end. The only express sanction to be found in the act is a penalty for each day's violation of the statutory command. A method of procedure is provided by which the Commission may determine whether a carrier does or does not fall within the class of offenders; if it does not so fall, of course, the act does not forbid the relation; but, even if it does so fall, the Commission still has the power to suspend the operation of the act, if certain specified conditions are found to exist. If the conditions do not exist, the offending carrier is left exposed to the statutory penalties; the Commission is not directed and apparently has no power (unless

> the power be implied) to take affirmative action toward dissolution. The plaintiff seems to suppose that the Commission has authority to order an offending carrier to divorce itself from the carrier by water; and, indeed, it seems to suppose also that the order of May 9, [7] 1915, is at least the equivalent of such a command. We do not so understand the situation. Whatever advice on this subject the Commission may have seen proper to give, either expressly or by implication, what the Commission has actually done is merely to refuse to act; it has declined to suspend the operation of the statute in the plaintiff's favor. No order of divorcement or any other affirmative command has been issued; the order complained of is purely negative, and nothing else is before us.

3. *Intermountain Rate Cases, 234 U. S. 476, distinguished.*—The appellant contends that while the order here under consideration is negative in form, it is positive in effect, and that the injunction therefore should have issued to restrain it, citing *Intermountain Rate Cases*, 234 U. S. 476. The Commission in those cases had denied, in certain respects, the application of certain carriers for authority to depart from the provisions of the fourth section of the act to regulate commerce, by maintaining lower freight rates between eastern points and points on the Pacific coast than between intermediate points. The Commerce Court enjoined the order, and on

appeal to this court, it was argued that the order was negative and therefore not subject to injunction. This court, however, overruling that contention, said, p. 490:

> Besides, the proposition disregards the fact that the right to petition the Commission conferred by the statute is positive and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist.

It is apparent from the foregoing decision that an order of the Commission denying an application of a carrier, either under the fourth section of the act to regulate commerce or under the Panama Canal Act, is not an affirmative order, unless "the conditions which the statute provides are found to exist."

The *Intermountain Rate Cases* are clearly distinguishable, by that limitation, from the instant case, for the reason that the Commission in the instant case denied the application of the appellant because the prerequisites to an extension of service were found by the Commission *not* to exist, while in the *Intermountain Rate Cases* the existence of such conditions was evident from the fact that the Commission granted *in part* the applications of the carriers for a waiver of the fourth section.

II.

THE ORDER HERE UNDER CONSIDERATION IS BASED UPON FINDINGS OF FACT SUPPORTED BY SUBSTANTIAL EVIDENCE AND DETERMINABLE EXCLUSIVELY AND FINALLY BY THE COMMISSION. THE DECREE OF THE DISTRICT COURT SUSTAINING THAT ORDER SHOULD THEREFORE BE AFFIRMED.

A. The question of competition or the possibility of competition is one of fact determinable by the Commission, not of law to be determined by the courts.

1. *Finality of Commission's findings.*—The statute, as heretofore noted, expressly provides that it shall be unlawful for any railroad to have any interest, directly or indirectly, in any water carrier, operating through the Panama Canal *or elsewhere*, with which the railroad does or may compete for traffic; confers jurisdiction upon the Commission "to determine questions of fact as to competition or the possibility of competition;" and further provides that "in all such cases the order of the Commission shall be final."

2. *Order supported by conclusive findings of fact.*—The Commission's finding that the appellant does or may compete for traffic with its lake line was based, not upon any one circumstance or condition, but upon a consideration of all the circumstances and conditions.

Thus the Commission found, as hereinafter more fully noted, that the appellant participated in through all-rail routes and joint rates, as well as in certain fast freight lines operated over its rails and the rails of its connections, to and from points served also by the lake line; that the appellant was a member of the Lake Lines Association, an organization

created to protect the interests of railroad-owned boat lines operating on the Great Lakes, and also a member of the so-called Trunk Line Association, established to supervise the rates, classifications, and practices of the participating railroads, and which, by the application of arbitrary switching charges at Buffalo, directed the lakes lines, respectively, via which through lake-and-rail traffic should be transported; that the appellant was receiving greater divisions from its through all-rail rates than from its through rail-and-water rates, and that, by reason of this fact, its interests were directly opposed to the interests of the lake line; that the appellant, in order to induce its western all-rail connections to route eastbound traffic over its lines, routed westbound traffic over the lines of such connections west of Buffalo, to the detriment of the lake line; and that the operation of the lake line entailed an annual deficit, borne by the appellant, of approximately $100,000. These several findings were fully set forth in the Commission's reports as follows:

8. FAST FREIGHT LINES.

> The "fast freight line" was the forerunner of the through route and had its origin in the lack of arrangements for the interchange of equipment. These fast freight lines acquired large numbers of freight cars and made arrangements with certain roads over which it was desired to establish a through service. This through service could be established by using several different combinations of roads,

so there was the same rivalry and striving between these several roads to be members of the particular fast freight line as exists under through route arrangements. The through route established, their business then is to solicit through shipments of freight to move all rail over the "line" that has been organized. To this end, soliciting offices were established in many trade centers. The participation in these "fast freight lines" entails the same sacrifice on the part of these petitioners' "boat lines" as was pointed out with respect to the through route arrangements. These roads are members of "fast freight lines" which are still in existence, and in the nature of things the best interests of their boat lines are made subservient to the interests of their rails, which, of course, are of much greater importance.

The Lehigh Valley Railroad Co. is a party to and has a proprietary interest in the Traders Dispatch and the Lehigh Valley-Wabash Dispatch, fast freight lines reaching Chicago and Milwaukee, ports served by boats of the Lehigh Valley Transportation Co. This petitioner in the year 1913 contributed $69,208.27 to cover its share toward the maintenance of the Traders Dispatch. [Record, p. 63.]

b. LAKE LINES ASSOCIATION.

The Lake Lines Association is an "understanding organization" which, while claiming not to be an organized agency, has held meetings, the records of which, as shown in the evidence presented in these cases, indicate

that its function is to insure a "proper" management of these lines, from the viewpoint of the railroads, which could not have been possible if their operation were unrestrained. The whole arrangement might be classed as a "get together movement" to which all the roads here petitioning are parties. While these two petitioning roads which are here specifically under consideration may not directly compete with their boat lines over the rails of their systems, their membership and activity in this association or participation in any like understanding places them in a position inimical to the best interests of their boat lines. Placed in such an attitude these roads, through the agency of other roads with which they are "partners" become the competitors of their own boat lines. [Record pp. 64–65.]

C. TRUNK LINE ASSOCIATION.

The lake lines in which the petitioners are interested have been shorn of the initial rate-making power. This power has been usurped by the trunk line association of which the petitioners are members. The through rates controlled by this authority, in which the boat lines are merely concurring carriers, determine for the shipper which lake line must be used. The particular route is controlled by applying arbitrary switching charges at Buffalo which compel the through lake-and-rail traffic to move via the predetermined lake line. The zones of territory to be served and those not to be served by the lake lines are

also determined by this outside authority. This is accomplished by maintaining a scale of rates, not subject to competition, that forces traffic by either all-rail or lake-and-rail routes, as desired by the trunk line association. The interest and concern of the trunk line association in fixing these different combinations of rates is simply the solidified interest of the several member railroads, whose individual interests have been above indicated. [Record, p. 65.]

d. APPELLANT'S DIVISIONS FROM ALL-RAIL ROUTE HIGHER THAN FROM RAIL-AND-LAKE SERVICE.

This leads to the inquiry, What interest has the Lehigh Valley Railroad in the all-rail rates from Chicago to the East? Its chief interest obviously is in the amount of the division of the all-rail rate which it is able to exact from its rail connections. If the Lehigh Valley was wholly dependent on its rail connections they would be in a position to dictate the division it would receive. While the Lehigh Valley has a lake line, however, it has a voice in what the all-rail rate should be, and, what is more important, it is in a position to demand large divisions of these rates. The record shows, as might be expected under such conditions, that on most of the eastbound traffic the Lehigh Valley Railroad divisions of the all-rail rate from Chicago to the East are larger than its division of the lake-and-rail rate for the same haul. Thus it has come about that the railroad gets more revenue out of the all-rail haul than out of the lake-and-rail haul on a particular shipment. Here, then, is a situation

where the interest of the Lehigh Valley Railroad directly conflicts with the interest of the lake line. To the extent that the Lehigh Valley Railroad is induced by its division of the all-rail rates to divert traffic from the lake-and-rail to the all-rail route it is striving against the lake line which it owns.

That this conflict of interest between the railroad and the lake line as to through traffic is not academic, but, on the contrary, exerts a real influence on the traffic policy of the railroad is made clear by the record. A letter from one official of the railroad company to another in 1904 is in the record, wherein it was stated that in connection with the eastbound movement of flour from Chicago "the old question" was presented "whether it is better to allow this business to go via central traffic roads and go after them for a share of it or make arrangements at Buffalo which would bolster up our lake line and concentrate freight there for shipment to the East." The official who wrote this letter testified that the situation from the standpoint of freight solicitation was the same to-day as in 1904. [Record, pp. 79–80.]

e. DIVERSION BY APPELLANT OF WEST-BOUND TRAFFIC TO DETRIMENT OF LAKE LINE.

These petitioners, in connection with all central freight association territory rail carriers, as shown by their concurrences, are the joint makers of tariffs publishing joint through rates for the all-rail transportation to and from the ports served by their boats. The only thing to indicate that the entire all-rail haul is

> not performed by their respective lines is the concurrence of their connections in these rates. Together with their connections they make a through line from the east to the lake ports over which both eastbound and westbound traffic moves all rail. They originate the westbound traffic and control its routing. The actual result of these arrangements is the same as if these petitioners owned the rails reaching these ports. [Record, pp. 61–62.]

Upon a consideration of the foregoing findings the Commission concluded that the appellant's rail line does or may compete for traffic with the lake line, Record, pp. 65–66. And upon rehearing this conclusion was affirmed, Record p. 80. The conclusiveness of this finding was recognized by the district court, as noted in its opinion, Record, p. 107, that—

> It is clear to us that the Commission had before it other relevant evidence than the fact that the plaintiff's boat line did not parallel its rail line, but that physically one was merely a prolongation of the other. The real question was what effect the traffic over one line had or might have upon the traffic over the other. Or in other words, was the amount of money received from freight carried by one line affected or likely to be affected by the amount of money received from a similar source by the other line? Upon this point there was relevant evidence before the Commission, and its finding is conclusive.

3. *Findings as to competition analogous to findings as to unreasonableness or discrimination.*—A finding

as to the existence or the nonexistence of competition involves precisely the same administrative problems as are presented by a determination of the reasonableness or the unreasonableness of a rate or practice, or of a question of discrimination. In *Int. Com. Com.* v. *Union Pacific R. Co.*, 222 U. S. 541, 547–548, this court, referring to the extent to which the findings of the Commission are judicially reviewable, declared:

> In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether on like testimony it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

In *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196, this court said:

> Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreason-

able, just or unjust. The determination of such issues involves a comparison of rate with service and calls for an exercise of the discretion of the administrative and rate-regulating body, for the reasonableness of rates and *the permissible discrimination based upon difference in conditions are not matters of law.* So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals. [Italics ours.]

In *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314, 320–321, this court said:

In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.*, 215 U. S. 452; *Interstate Com. Com.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar char-

> acter would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.

Just as, in the case last cited, the district court had erred in substituting its own judgment for that of the Commission on a question of discrimination, so also in the instant case it would have been erroneous for the district court to have substituted its judgment for the judgment of the Commission on the question of competition or the possibility of competition. The determination of the question of competition calls for the exercise of discretion on the part of an administrative, rate-regulating body, in order to secure uniformity and to prevent the conflicting decisions which would necessarily result from an attempt by the courts, in advance of action by the Commission, to determine such a matter. Congress recognizing this situation has left to the Commission the determination of the question of competition, and has made the Commission's findings "final."

Unless the Commission's finding, that the appellant's rail line does or may compete for traffic with the lake line, is arbitrary or unreasonable the district court had no power to review that finding, as it expressly recognized in its decision, Record, pp. 106–107, wherein it said:

> Its [the Commission's] findings are made final, and final they must remain, but with one qualification—certain fundamental rules must have been obeyed. In spite of the

> statutory declaration of finality, the court still retains a limited power of supervision—enough to see that constitutional requirements have been observed; *Intermountain Rate Cases*, 234 U. S. 490; *U. S.* v. *R. R.*, 235 U. S. 320. There must have been a hearing, with the essentials involved in that word, and the action of the Commission must not have been arbitrary; but in other respects we have no right to review what has been done, or the manner of doing it. We can not substitute our judgment for the judgment of the Commission on the weight or the effect of the evidence, or correct mistakes that may have entered into the findings of fact.

That the findings of the Commission were not arbitrary or unreasonable was likewise recognized by the district court, as indicated in its opinion, Record, p. 107:

> Now the finding that the plaintiff does or may compete for traffic with its boat line is a finding of an ultimate fact exactly as the finding of discrimination was decided to be in *Meeker* v. *Railroad Co.*, 236 U. S. 427; and the only question that remains is whether such a finding was made without evidence or by disregarding the evidence plainly and arbitrarily. In view of the full reports of the Commission the subject need not be discussed.

B. The Commission's ultimate finding of competition, even if a conclusion of law, should be sustained.

1. "*Competition*", *as used in statute, construed by Commission in ordinarily accepted sense.*—The Commission, in its original report of May 7, 1915, and in

its supplemental report of December 13, 1915, applied the term "competition" as it is ordinarily understood in connection with transportation matters. Webster defines the word as:

> The act of seeking or endeavoring to gain what another is endeavoring to gain at the same time; *common strife for the same object;* strife for superiority; emulous contest; rivalry, as for approbation, for a prize, or as *where two or more persons are engaged in the same business and are seeking patronage.* [Italics ours.]

The Standard Dictionary defines "competition" as:

> 1. The act or proceeding of striving for something that is sought by another at the same time; a contention of two or more for the same object or for superiority; rivalry, as between aspirants for honors or for advantage in business, as *competition* for promotion is keen. 2. Polit. Econ. and Com. (1) The independent endeavor of two or more persons to obtain the business patronage of a third by offering more advantageous terms as an inducement to secure trade. (2) The conditions which this endeavor produces.

The Commission, in its supplemental report, Record, pp. 79, 80, referring to the fact that the appellant was receiving higher divisions from its all-rail route than from its rail-and-lake route, said:

> Here, then, is a situation where the interest of the Lehigh Valley Railroad directly conflicts with the interest of the lake line. To the extent that the Lehigh Valley Railroad is induced by its division of the all-rail rates

> to divert traffic from the lake-and-rail to the all-rail route it is "striving" against the lake line which it owns. * * *
>
> The above considerations make clear that as to a large volume of through traffic eastbound the petitioner does or may "strive" in the interest of the all-rail routes for traffic which the lake line might otherwise secure. The facts referred to in the original report of the Commission tend to show a "striving" in another way by the railroad company in the interest of the all-rail route for westbound traffic from New York to Chicago which might otherwise move by the rail-and-lake route. The record discloses many other facts which, together with those referred to above, show competition within the definition of that word which was given by the Supreme Court in the *Union Pacific Case*, 226 U. S., [61] at page 87.

In the case last cited by the Commission, the Union Pacific Railroad Company had acquired about 46 per cent of the outstanding stock of the Southern Pacific Company, constituting, it was contended, a violation of the Sherman Antitrust Act of 1890. This court concluding that the two systems had been in *competition* prior to the purchase of the stock, observed, p. 87:

> To compete is to strive for something which another is actively seeking and wishes to gain. The Southern Pacific through its agents, advertisements, and literature had undertaken to obtain transportation for its "Sunset" or southerly route across the continent, while the Union Pacific had endeavored in the same

territory to have freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast.

* * * * *

Competition between two such systems consists not only in making rates, which, so far as the shipper was concerned, the proof shows, were by agreement fixed at the same figure whichever route was used and then apportioned among the connecting carriers upon a basis satisfactory to themselves, but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight, and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their revenues. The inducement to maintain these points of advantage—low rates, superiority of service, and accommodation—did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment.

The Commission found that the appellant's rail line was "actively seeking" traffic which otherwise might be routed via the lake line; and that it was to the interest of the appellant to route as much traffic as possible all-rail via its connections west of Buffalo, as by so doing it would receive from those

connections more east-bound traffic at Buffalo. It was further apparent to the Commission that if the lake line were independently operated it would strive, "through its soliciting agencies, advertisements, and literature," to divert traffic from the appellant's all-rail lines, and that the latter would endeavor "in the same territory to have freight shipped by way of its own and connecting (rail) lines," instead of by the lake line.

Not only does the appellant compete with the lake line in through all-rail rates, as against rail-and-water rates, but if the lake line were independently operated, the two companies would compete for traffic by vieing with each other "in handling and caring for freight and the prompt recognition and adjustment of the shippers' claims." Obviously, moreover, the inducement to maintain these points of advantage—low rates and superior service—can not be the same where the operating agencies are dominated by a common ownership, as where they are controlled by competing owners whose individual success depends upon their own endeavors.

It was upon a consideration of "competition," as defined by this Court in the *Union Pacific Case*, that the Commission concluded that the appellant does or may compete for traffic with the lake line.

2. *Commission's interpretation of "competition" consistent with purpose of Congress as deduced from history of period in which statute was adopted.*—The "history of the times" or "the environment at the time of the enactment of a particular law" is

germane to a consideration of its purpose. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 316, 320; and *Standard Oil Co.* v. *United States*, 221 U. S. 1, 50. The contemporaneous history of the times, as exhibited by the debates in Congress, in connection with the enactment of the Panama Canal Act, is therefore pertinent.

For many years prior to the adoption of that statute it had been the practice of the railroads so to stifle free competition by water as practically to eliminate water lines where they were in competition with rail service. It was to remedy this condition, and to restore to the public the advantages of lower rates and better service which would result from the independent operation of the water lines, that the statute was adopted. Senator Bristow, of Kansas, in this connection said, Cong. Rec. No. 398, vol. 48, pt. 10, p. 10469:

> * * * it is clear that unless railroad-owned steamships are prohibited from using the Panama Canal it will not be of much use to the American people; it will be monopolized and controlled absolutely by the transcontinental railroads, as they control the traffic from Galveston to New York, as the railroads control the traffic on the Lakes, and as they have controlled it on the rivers. I feel that it is a duty that we owe to the country and to the people, whose money has constructed this great commercial highway, to keep it free from the monopoly of the gigantic transcontinental lines.

Senator Jones, a member of the Committee on Interoceanic Canals, said, Cong. Rec. No. 398, pt. 10, p. 10281:

> It has been the policy of the railroads in the past to stifle control and to minimize water transportation. As a result transportation on our rivers has practically disappeared. In many cases it has been driven out of existence by the cutthroat rates made by railroad lines for that very purpose. So often had this been done that two or three years ago legislation was enacted to prevent it. It also is generally known that the principal steamship lines of the Great Lakes and the Atlantic and Pacific coasts are to-day under the control and operated by railroad lines, and the result is that there is no great difference between the rates charged by the railroads and those charged by the water lines for the same service. This result has come about not by the reduction of railroad rates, but by the raise of water rates.

Senator Clapp, Minnesota, said, Cong. Rec. No. 398, vol. 48, pt. 10, p. 10470:

> If there is any one thing which is grotesque in public life it is taking money from the Public Treasury and devoting it to the construction of a canal and locks and deepening harbors upon the theory, which perhaps once was a fact, that water transportation, being cheap and open to small investors, presented a field for independent activity which, resulting in competition, causes cheaper transportation and justifies in its general benefit the use of public funds for that purpose. I say if theer

is anything grotesque it is to continue a condition where the public generally does no longer get the benefit of it.

Between the combinations that have been organized, not only is the building and development of independent agencies discouraged, but railroad-controlled water transportation, instead of admitting of competition, has become an instrument for the stifling of competition.

The act was not confined to the operation of boats through the Panama Canal, but was aimed at securing to the public the free and unfettered use of all the navigable lakes and rivers of the country. The House Committee on Interstate and Foreign Commerce, referring to section 11 of the Panama Canal act, Cong. Rec., vol. 48, pt. 4, p. 3495, said:

The apprehension of railroad-owned vessels driving competition from the canal may or may not be exaggerated, but it is certain that the evil, which is only anticipated there, already exists in the coastwise trade on both coasts, as well as on our lakes and rivers. The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition. In answering demands for the exclusion of railroad-owned ships from the canal, which in this bill or any other would simply amount to an amendment of the act to regulate commerce, the committee thinks it wise, just, and oppor-

> tune to broaden the amendment so as to serve the higher, wider, more pressing, and more necessary purpose of excluding the railroads from operating vessels in competition with their tracks anywhere in the coastwise trade generally or in the lakes and rivers.

Representative Mann, of Illinois, said in the House debate, Cong. Rec., vol. 48, pt. 7, p. 6920:

> We may pass laws about interstate commerce commissions and may confer authority as we please, but there is no power so potent in the control of railway rates as rival water lines.

3. *Parallel operation of rail and lake lines not prerequisite to competition.*—It was said during the debate in the House that the only purpose of the act was to exclude "the railroads from operating vessels in competition with their *tracks* anywhere in the coastwise trade generally or in the lakes and rivers," Cong. Rec. vol. 48, p. 3495. The appellant contends that this use of the word "tracks" indicates that Congress intended the act to apply only where the rails of the owning carrier actually parallel its lake line, at least for part of the distance. But this argument gives undue significance to the word "tracks," and is at variance with the broad discretion which the act expressly confers upon the Commission, to determine the existence of competition. Moreover, nowhere in the act is there any attempt to restrict the application of its provisions to cases wherein the rail line *parallels* the water line.

In *Peninsular and Occidental S. S. Co.*, 37 I. C. C. 432, 434, also an application under the Panama Canal Act, the Commission said:

> Petitioners contend that they are not, and can not be, in competition with the steamship company, as the steamship company is but an extension of their respective rail lines. It is urged that the purpose of the amendment of the act was only to exclude railroads from operating vessels parallel to and in direct competition with their tracks. We can not agree with this contention. A rail carrier by participating in a through route between two termini only one of which is reached by its rails in fact serves both termini, and may compete within the meaning of section 5 as amended with steamers operating as part of another through route between the same termini.

The case of *State* v. *Montana Ry. Co.*, 21 Mont. 221; 53 Pac. 623, 628, involved the construction of certain provisions of the constitution and statutes of Montana relating to the consolidation and leasing of "parallel or competing" lines of railroad, particularly as applied to the Montana Railway and to the Butte, Anaconda & Pacific lines, it being insisted by those carriers that they were not parallel or competing but continuous and connected lines. The court, refuting this contention, said:

> Strictly speaking, the line of road of the Montana Railway Company consists of the road—the superstructure—over which it operates its trains in the exercise of its franchise,

and none other; from an exact standpoint, it is limited in its railroad operation to the few miles of rails and other property belonging to its own corporation, inasmuch as it neither controls nor operates other roads by lease, ownership, consolidation, or otherwise. Thus literally regarding the situation, there could be no competition between the Montana Railway and the Butte, Anaconda & Pacific lines.

But a majority of the court prefer to adopt what we think to be a more practical way of looking upon this branch of the case, and to consider the constitution as comprehending by competing lines not only railroads which run between the same two principal points on their own lines, but those which, having one common terminus, yet are actually connected with other railroads, and which, by arrangements with such other railroads concerning the transportation of freight and passengers, are so related to one another in fact as to give them the opportunity by geographical situation to directly cut rates to principal or terminal points.

Congress did not intend to make it impossible for a railroad to supplement its rails by the addition of a boat line as an extension or feeder, but neither did Congress intend to make it possible for a rail line to supplement its rails by a boat line and then use that boat line to exclude or reduce competition on the water route.

The traffic here involved is that which originates at or is destined to points west of Buffalo, such, for instance, as traffic to or from New York.

The lines of transportation competing for such traffic are those extending from New York to points served by the lake line, as well as the constituent parts of those respective lines. Among those available routes would be one composed of the rail-and-lake lines of the appellant and another composed of the rail-lines of the appellant and its rail-line connections. That the lines composing such through routes are natural competitors is too obvoius to permit of controversy. Is the rail-line of the appellant, as a part of the through all rail-line, a competitor of the lake line as a part of the lake-and-rail line? Necessarily it is, for if the lake line were independent, or were operated in connection with some railroad other than the appellant, it would probably constitute a formidable competitor.

The error of the appellant's contention lies in the fact that it assumes that the Commission's order is based upon a finding that the appellant, as a participant in the rail-and-lake line, competes with the lake line. The actual finding is that the rail line of the appellant as a part of the all-rail line from New York to points served by the lake line competes or may compete with the lake line as a part of the rail-and-lake line between those points.

The Commission, in determining whether or not competition on the lakes would be reduced by compliance with the application of the appellant considered whether or not the interest of the appellant in the rates over the all-rail line was such that it would probably so use its boat line as to suppress or reduce

competition on the route by water, and this question, of course, was determined in the light of what was then being done and had been done in the past.

The voluntary establishment of through routes and joint rates which the Commission might compel the rail carrier to establish can not of itself deprive the rail carrier of the right to operate a boat line which it might otherwise operate, but neither can the mere existence of the power in the Commission to require the establishment of through routes and joint rates give the rail carrier the right to operate a boat line which it would not otherwise have the right to operate. The voluntary establishment of such through routes and joint rates in connection with other facts may authorize the Commission to find the possibility of competition, but the Commission must then determine whether or not competition will be excluded, prevented, or reduced on the route by water if the rail line should continue to operate its water service; and in cases where it determines that competition in that event will not be so suppressed or reduced, and that the existing water service "is being operated in the interest of the public and is of advantage to the convenience and commerce of the people," the operating rail line has the right to continue the operation of its water service.

4. *"May compete" contemplates possibility of competition of rail lines and lake line independently owned and operated.*—The Panama Canal Act makes

it unlawful for a railroad to operate a boat line with which the railroad "does or may compete." The expression "may compete," as used in the statute, clearly contemplates that competition between a railroad and its boat line which would result if the carriers were independently owned and operated. In other words it is unlawful for a railroad to operate a boat line with which, *if that the line were independently operated*, the rail line "would or might compete for traffic." Only by such an interpretation of the statute does the standard which makes a further joint operation lawful or unlawful, namely, competition or the possibility of competition, satisfy the intention of Congress. So Congress provided that it should be unlawful for a railroad either to *acquire* any interest in an independent boat line with which it does or may compete or to *continue* to have any interest in a boat line which it now owns and with which, *if it were independently operated*, it would or might compete.

As was said by the Commission in *Application of the Southern Pacific Co. in connection with the Operation of the Pacific Mail S. S. Co.*, 32 I. C. C. 690, 694:

> The words "may compete for traffic" do not mean a vague, possible though improbable competition, but mean a probable, potential competition as when the water line is entirely divorced from the railroad. We must, therefore, look at the conditions as they will exist if this divorce is effected

In *Southern Pacific Co. Ownership of Oil Steamers*, 37 I. C. C. 528, 536, the Commission said:

> Competition is a question of fact to be determined by the circumstances in each case. It means something more than an occasional movement via a rail line which parallels a water line, where the rail line operates at a serious disadvantage in that it does not and can not offer rates and service on anything like equal terms with the water line. Whether or not there would be a normal, active competition between the rail line and the water line if operating independently of each other is the best practical test of competition.

Under independent ownership the lake line would be free to enter into through routes and joint rates east of Buffalo with carriers other than the appellant. The existence of a route other than that via the lines of the appellant and its all-rail connections west of Buffalo would clearly result in competition between the lake line and the appellant, for the two carriers would then each be striving independently to influence the shipper to use that route which it would be in its best interest for the shipper to use. If a shipper were persuaded to route rail and lake, the appellant would lose the haul. If a shipper were persuaded to route all rail, the lake line would lose the haul. Here are the very elements which go to make up competition.

5. *Order should be sustained unless Commission's findings show affirmatively no possibility of competition.*—The only finding of fact which the Commission

was required to make, in order to give it jurisdiction in the instant case, was a finding as to whether or not there was "competition" or a "possibility of competition," and that is the only finding of fact now contested by the appellant. Unless, therefore, there is some fact in the reports which shows affirmatively that the finding of "competition" or "possibility of competition" can not be true, the order can not be set aside in the absence of the record before the Commission. *Louisville & N. R. Co.* v. *United States*, 238 U. S. 1.

Even in reparation cases, where the Commission is required to make a finding of facts, the fact that the evidential facts stated are not sufficient to support the ultimate finding of fact does not invalidate the order of the Commission. Thus, in *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 427, this court by Mr. Justice Van Devanter said:

> Another objection which was directed against the orders as well as the reports is that they contain no findings of fact, or at least not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts; that is to say, the primary facts from which through a process of reasoning and inference the ultimate facts may be determined. We think this is not the right view of the statute and that what it requires is a finding of the ultimate facts. * * *.

There was a large volume of evidence before the Commission which has not been made part of this record, and to that evidence the Commission referred for the purpose of supporting its finding of possibility of competition. In its report on petition for rehearing the Commission, after referring to many facts and circumstances in support of its conclusion, said, Record, p. 78:

> The above circumstances, together with the large volume of evidence showing aggressive activities of the Trunk Line Association and the Lake Lines Association, to which the Lehigh Valley Railroad Company was a party, in developing and extending the traffic over the all-rail through routes at the expense of the lake-and-rail routes, including that in which the lake line participated, demonstrated that the possibility of competition for through traffic between the railroad company and its rail connections and the lake line was real and substantial—so real and substantial that the railroad company, acting with other trunk lines, organized and maintained the Lake Lines Association, a chief function of which was the controlling of lake rates and service in such a manner as to advance the interests of the all-rail routes.

C. The Panama Canal Act is Constitutional.

The appellant argued before the district court that the Panama Canal Act is unconstitutional because the Commission is thereby authorized to

determine whether or not a boat line "is being operated in the interest of the public and is of advantage to the convenience and commerce of the people." It is asserted that such a delegation of powers is too general; that it is for Congress itself, and not for an administrative tribunal created by Congress, to determine what is in the interest of the public and is of advantage to the convenience and commerce of the people. But it is well settled that such a delegation of legislative power is not unconstitutional. In *Field* v. *Clark*, 143 U. S. 649, after citing various statutes whereby Congress had authorized the President to suspend or declare inoperative certain laws "whenever in his opinion the public safety shall so require," or "when he shall deem it expedient and consistent with the interest of the United States," or "when in his judgment public interest shall require it," this court in effect rejected the contention that such statutes were unconstitutional.

Section 4 of the act provides that upon application to the Interstate Commerce Commission a common carrier "may in special cases, after investigation be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property." No precise rule is prescribed to determine what constitute "special cases," yet this has been held not to be an unconstitutional delegation of legislative powers. *Intermountain Rate Cases, 234 U. S. 476.*

The district court, overruling the appellant's contention that the act is unconstitutional, declared Record p. 109:

> The lawmaking power laid down as definite a rule as it could, and merely entrusted the Commission with authority to ascertain the facts. The Commission did not ordain the rule, but merely applies it. Indeed, the plaintiff seems to overlook this aspect of the statute. In sweeping terms, *all* forms of joint control are forbidden to the carriers described, but the paragraph now attacked allows the Commission to suspend the prohibition in a certain class of cases. This is a favor granted to the carriers in exceptional cases, and is not the invasion of a right. If they had a right to be invaded, it was the right of common control, but this (it is conceded) was lawfully taken away, and the carrier can hardly criticize the terms on which the sovereign sees fit to restore it as a matter of grace.

CONCLUSION.

This case is one of peculiar importance, for it involves the untrammeled use of the Great Lakes as a natural highway for water-borne commerce. In making it unlawful for a railroad to operate a boat line with which it "does or may compete for traffic," Congress intended to secure to the public these natural waterways free from railroad control. The desire of the appellant to operate its lake line at an admitted loss of approximately $100,000 per annum indicates the importance which it attributes to the

lake line in excluding from the Great Lakes the dangerous competition of independent privately owned boat lines. It was just such a situation which Congress, in passing the Panama Canal Act, intended to preclude, and the Commission, in denying the appellant's application, construed the act as Congress had intended it should be applied.

The district court properly declined to enjoin the Commission's order, because:

1. An injunction should not have issued to restrain the enforcement of an order which is negative both in form and substance.

2. The finding of competition or the possibility of competition is the finding of an ultimate fact, based upon substantial evidence, which should not have been disturbed unless the Commission acted arbitrarily or in an unreasonable manner.

3. The Commission's conclusion that the appellant "does or may compete for traffic" with its lake line is fully supported by the record, and should be sustained.

The decree of the district court should therefore be affirmed, and the interlocutory injunction heretofore granted should be dissolved.

Respectfully submitted,

JOSEPH W. FOLK,

Counsel for the Interstate Commerce Commission.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

LEHIGH VALLEY RAILROAD COMPANY, appellant,
v.
UNITED STATES OF AMERICA (AND Interstate Commerce Commission, intervener).
No. 733.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

Lehigh Valley Railroad Company filed an original bill to enjoin the order of the Interstate Commerce Commission (R. 9), which denied its application (R. 22) under section 11, act of August 24, 1912 (37 Stat. 566), known as the "Panama Canal Act," for leave to continue the ownership of the capital stock, and the control and management, of Lehigh Valley Transportation Company (report, 33 I. C. C. 699, 716; rehearing, 37 I. C. C. 77, 80).

After final hearing, and with a full opinion (234 Fed. Rep. 682), the District Court (Circuit Judges Buffington, McPherson, and Woolley all concurring) entered a final decree (R. 110) dismissing the bill, from which this appeal was taken (R. 115).

Lehigh Valley Railroad Company is a Pennsylvania corporation, and an interstate carrier by railroad between New York Harbor and Buffalo (R. 3). Lehigh Valley Transportation Company is a New Jersey corporation, and a carrier by steamship between Buffalo, Duluth, Milwaukee, and Chicago (R. 3, 4). Each is a separate and distinct company, organized for different purposes, and each is capable of operating and discharging its corporate functions without relation to the other. The railroad company, or Pennsylvania corporation, owns the entire capital stock of the transportation company, or New Jersey corporation, and the two companies are directed and operated by the same officers and managers (R. 3).

Traffic may move between Great Lakes ports and Atlantic seaboard over two separate routes.

Westward: Rail, L. V. Railroad Co., and water, L. V. Transportation Co.; or, all-rail, L. V. Railroad Co. and rail connections at Buffalo.

Eastward: Water, L. V. Transportation Co. to Buffalo, and rail, L. V. Railroad Co. to seaboard; or, all-rail, rail connections to Buffalo, and L. V. Railroad Co. to seaboard.

With the exception of a differential of 2 cents on first-class traffic, and there is little, or none, of that,

the lake-and-rail rates have been successively advanced since 1900 until they are now the same as the all-rail-rates (R. 71). The Commission found: "The successive advances, as the records show, have had the effect not only of preventing an increase in lake line tonnage, but in diverting from the lake routes, to the all-rail lines, part of the tonnage which formerly moved on the lakes. Furthermore, there is much in the records tending to show that the very purpose of these advances in lake-and-rail rates was to direct tonnage to the all-rail lines."

Lehigh Valley Railroad Company alleges it derived a revenue during a single year of traffic handled to and from the boats of over $910,000 (R. 9). It fixes the total present cash value of the boats at $1,127,428 (R. 4). The transportation company is operated at an annual deficit of $100,000, which the railroad company advances (R. 78). If the railroad company took for itself $910,000 for the year, and these boats handled the same traffic at the same time at a deficit of $100,000, a situation existed which the Panama Canal Act was expressly designed to reach.

Lehigh Valley Railroad Company is able, through such use of the boat line, to compel the connecting rail lines if they wish to haul the traffic, to pay divisions to it as high as or higher than those which it fixes from the boat line.

The Commission found (R. 79): "While the Lehigh Valley has a lake line, however it has a voice in what the all-rail rate should be and, what is more

important, it is in a position to demand large divisions of these rates. The record shows, as might be expected under such conditions, that on most of the eastbound traffic the Lehigh Valley Railroad divisions of the all-rail rate from Chicago to the East *are larger than its division of the lake-and-rail rate for the same haul.* Thus it has come about that the railroad gets more revenue out of the all-rail haul than out of the lake-and-rail haul on a particular shipment."

It is a matter of judicial knowledge that the cost of water transportation is far less than the cost of rail transportation. If the divisions of Lehigh Valley Transportation Company are so low as that it must operate at a deficit of $100,000 per year, and the cost of the rail transportation is higher than the boat transportation, then what becomes of the revenues of the connecting rail lines of Lehigh Valley Railroad Company, when it exacts from them even higher divisions than it exacts from the boats? The connecting rail lines must be handling the traffic at a much greater deficit.

Lehigh Valley Transportation Company is a member of the Lake Lines Association, which is an "understanding organization," to insure a "proper" management of the water lines from the viewpoint of the railroads (R. 64). The Commission found (R. 65): "While these two petitioning roads" (Lackawanna and Lehigh Valley) "which are here specifically under consideration may not directly compete with their boat lines over the rails of their systems, their membership and activity in this asso-

ciation or participation in any like understanding places them in a position inimical to the best interests of their boat lines. Placed in such an attitude these roads, through the agency of other roads with which they are 'partners' become the competitors of their own boat lines."

Lehigh Valley Railroad Company is also a member of the Trunk Line Association, with respect to which the Commission found (R. 65): "The lake lines in which the petitioners are interested have been shorn of the initial rate-making power. This power has been usurped by the Trunk Line Association of which the petitioners are members." After explaining the operations of the Trunk Line Association, the Commission further found (R. 65): "The interest and concern of the Trunk Line Association in fixing these different combinations of rates is simply the solidified interest of the several member railroads, whose individual interests have been above indicated." In conclusion, the Commission found (R. 65): "From a consideration of all the circumstances the Commission is of opinion, and finds, that each of the applicants" (Lehigh Valley Railroad Company) "here involved does or may compete for traffic with the lake line or lines in which it has an interest."

On the rehearing, and after summarizing what it had previously found (R. 78), the Commission said (R. 79, 80): "One of the officials of the railroad who should be familiar with all of its traffic and rate interests testified that he could not tell whether the

lake line was a benefit or a burden to the railroad from a dollars and cents standpoint, but that one reason which he was certain led the railroad to maintain its interest in this lake line was to secure for the railroad a voice in the making of the all-rail rates from Chicago to the East. * * * That this conflict of interest between the railroad and the lake line as to through traffic is not academic, but, on the contrary, exerts a real influence on the traffic policy of the railroad is made clear by the record. A letter from one official of the railroad company to another in 1904 is in the record, wherein it was stated that in connection with the eastbound movement of flour from Chicago 'the old question' was presented, 'whether it is better to allow this business to go *via* central traffic roads and go after them for a share of it or make arrangements at Buffalo which would bolster up our lake line and concentrate freight there for shipment to the East.' The official who wrote this letter testified that the situation from the standpoint of freight solicitation was the same to-day as in 1904. Thus it appears that the solicitation of eastbound traffic by the railroad is not done with an eye single to the interests of the lake line in the haul from Chicago to Buffalo, but is influenced by the interests of the central freight association roads which, with the aid of the Lehigh Valley Railroad, directly compete with the lake line."

On the undisputed facts and conclusions of the Commission thereon reached after two full hearings it can hardly be maintained that Lehigh Valley

Transportation Company is allowed to operate as a *bona fide* water carrier at all. It is a bludgeon in the hands of Lehigh Valley Railroad Company and to accomplish a common end it is effectively used for various purposes: A, to suppress, and to keep suppressed, independent boat line competition on the Great Lakes; the Commission found (R. 73): "* * * there is now no competition from independent lines * * *. The large financial resources of the owning railroads make it impossible for an independent to engage in a rate war with a boat line so financed;" B, to dictate the line of cleavage in the distribution of all traffic moving between Great Lakes ports and seaboard; C, to increase to itself the volume of that traffic from its rail-line connections at Buffalo; D, to force increases of its own divisions of the through all-rail rates.

II.

THE STATUTE.

Section 11 of the act of August 24, 1912 (37 Stat. 566), commonly known as "The Panama Canal Act," provides:

> From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or

directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing

specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

III.

THE HISTORY OF THE TIMES.

The learned counsel for appellant refer to "the history of the evil Congress sought to remedy by the passage of the act" (Br. 10), and cite *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 463. If, in view of the full findings of the Commission and the

clear provisions of the statute, there is still needed extraneous light for its proper interpretation, the "history of the times" or "the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted," may be resorted to. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 316, 320; *Standard Oil Company* v. *United States*, 221 U. S. 1, 50.

Chairman Adamson, Georgia, of the Committee of Interstate and Foreign Commerce, submitted House report on section 11, No. 423, Sixty-second Congress, second session, which says (Cong. Rec., vol. 48, pt. 4, pp. 3493, 3495):

> The apprehension of railroad-owned vessels driving competition from the canal may or may not be exaggerated, but it is certain that the evil, which is only anticipated there, already exists in the coastwise trade on both coasts, as well as on our lakes and rivers. The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition. In answering demands for the exclusion of railroad-owned ships from the canal, which in this bill or any other would simply amount to an amendment of the act to regulate commerce, the committee thinks it wise, just, and opportune to broaden the amendment so as to serve the higher, wider, more pressing, and more necessary purpose of excluding the railroads

from operating vessels in competition with their tracks anywhere in the coastwise trade generally or in the lakes and rivers.

Representative Knowland, California, a member of the same committee, who presented the minority report on section 11, said (Cong. Rec., vol. 48, pt. 7, pp. 6592–6595):

> The people of California have not appealed to Congress for protection against imaginary dangers. Their experience of 30 years with railroad-controlled water lines is responsible for the demand, voiced through the leading commercial organizations in every section of the State, that Congress, in the pending bill, provide against the possibility of the railroads impairing the value of the Panama Canal as a regulator of transcontinental freight rates.
>
> * * * Between 1877 and 1892 the Pacific Mail Steamship Line, which was carrying freight in alleged competition with the railroads between San Francisco and New York via the Isthmus of Panama, was paid a monthly subsidy by what was known as the transcontinental railway pool, ranging between $110,000 and $75,000, the amount of the subsidy for these 14 years reaching the enormous total of $14,555,000. These monthly payments were in part for space in the steamers of the Pacific Mail, which space was frequently not filled; but the object of the subsidy was attained, and California shippers were deprived of the benefits of water competition.
>
> * * * * *

> In 1911, with the California-Atlantic Steamship Line in the field, operated in genuine competition with the Pacific Mail, the eastbound freight movement for that fiscal year increased to 105,577 tons, of which the Pacific Mail carried 47,892 and the California-Atlantic 57,685 tons. This competing company put on a direct line of steamships to Panama, forcing the Pacific Mail to follow suit. Prior to this time it had taken the Pacific Mail steamers between 26 and 30 days to make the run to Panama, owing to the numerous calls at Central American ports. With their direct line they cut the time to 12 days. The California-Atlantic Line was fast becoming too formidable a competitor and the necessity of driving this rival off the ocean became apparent. Casting about for an effective method, it was determined to temporarily reduce rates to a figure that would be unprofitable, the railroad-owned line, backed by strong financial interests, being certain that it would survive the war. The Pacific Mail had always claimed that an $8 rate was unremunerative, but in face of all previous contentions the rate was lowered to $5.

Senator Townsend, Michigan, in debating section 11, said (Cong. Rec., No. 397, vol. 48, pt. 9, p. 9238):

> Water transportation, if kept free and unmonopolized, will reduce rail rates and keep them reasonable, and this will be true not only at points where rail and water are directly competitive, but it will affect rates in the

somewhat remote interior. I shall not attempt to cite cases and quote rates proving this proposition, but shall content myself by saying that water competition, active or potential, affects rail rates directly for more than a hundred miles from the water, and when the canal is completed self-preservation will compel the rail carriers to reduce their rates to all interior points. Where free and sufficient water transportation facilities exist direct and indirect competing rail transportation is reasonable. We need no commerce commission to keep railroad rates reasonable where water competition exists. The water carrier is the best and most effective rail-rate regulator.

* * * * *

A boat owned by the railroad and engaged primarily in the foreign trade could, so far as its owners were concerned, carry coastwise traffic at less than cost if by so doing it could lessen the number of water competitors, for eventually these owners would regain whatever they had temporarily lost; but if at this time we serve notice upon the prospective shipowners of the United States that we propose to give the railroads and the capital back of them the right to enter the canal on equal terms with all others, we may be quite sure that the railroads will not need to establish unprofitable rates, for no independent boats will be built; no competitors will appear.

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Senator Percy, Mississippi, in debating section 11, said (Cong. Rec., No. 398, vol. 48, pt. 10, p. 9470):

> The first danger that is suggested in regard to that competition is that if railroad-owned ships are allowed to go through the canal, competition will be throttled by the rates being first put down to the point of driving out competition and then put up so as to furnish no competition with the transcontinental railways.
>
> I am not one of those who consider that danger a mythical one, if we are to judge of the course of the railroads in the future by what has been their history in the past. They have been ruthless in throttling competition by the waterways of this country wherever they were in a position to do so. If that suspicion lies in the minds of the American people, it has been placed there by the course of conduct pursued in the past by the railways of this country.

Senator Jones, Washington, a member of the Committee on Interoceanic Canals, said (Cong. Rec., No. 398, pt. 10, p. 10281):

> The railroads are quasi public agencies. They perform governmental functions, and as such they should be confined to the purpose for which they are built, to wit, the transportation of passengers and freight on land over the lines constructed and operated and under Government supervision and control. While owned and operated by private individuals they secured their franchises through the Government, State or National, for a particu-

lar purpose, and they ought to be restricted in their operations to the particular service for which they are organized.

* * * * *

It has been the policy of the railroads in the past to stifle control and to minimize water transportation. As a result transportation on our rivers has practically disappeared. In many cases it has been driven out of existence by the cutthroat rates made by railroad lines for that very purpose. So often had this been done that two or three years ago legislation was enacted to prevent it. It also is generally known that the principal steamship lines of the Great Lakes and the Atlantic and Pacific coasts are to-day under the control and operated by railroad lines, and the result is that there is no great difference between the rates charged by the railroads and those charged by the water lines for the same service. This result has come about not by the reduction of railroad rates but by the raise of water rates.

Senator Clapp, Minnesota, said (Cong. Rec., No. 398, vol. 48, pt. 10, p. 10470):

If there is any one thing which is grotesque in public life it is taking money from the Public Treasury and devoting it to the construction of a canal and locks and deepening harbors upon the theory, which perhaps once was a fact, that water transportation, being cheap and open to small investors, presented a field for independent activity which, resulting in competition, causes cheaper trans-

portation, and justifies in its general benefit the use of public funds for that purpose. I say if there is anything grotesque it is to continue a condition where the public generally does no longer get the benefit of it.

Between the combinations that have been organized, not only is the building and development of independent agencies discouraged, but railroad-controlled water transportation, instead of admitting of competition, has become an instrument for the stifling of competition.

Senator Bristow, Kansas, said (Cong. Rec., No. 398, vol. 48, pt. 10, pp. 10469):

> * * * it is clear that unless railroad-owned steamships are prohibited from using the Panama Canal it will not be of much use to the American people; it will be monopolized and controlled absolutely by the transcontinental railroads, as they control the traffic from Galveston to New York, as the railroads control the traffic on the Lakes, and as they have controlled it on the rivers. I feel that it is a duty that we owe to the country and to the people, whose money has constructed this great commercial highway, to keep it free from the monopoly of the gigantic transcontinental lines.

Senator Poindexter, Washington, said (Cong. Rec., 399, vol. 48, pt. 11, pp. 10556, 10562):

> * * * I said if the transcontinental railroads at the same time owned a line of ships plying between the Atlantic and Pacific they would favor their own line of ships in three

ways. First, by granting them special and favored trade. Second, by granting them special advantages of docks which are controlled and monopolized by the railroads in all the Pacific cities, with the exception of some new docks which are being put in by the city of Los Angeles. In every place they would discriminate in favor of their own line. Even if these two methods which I have described should be prohibited, they would evade the order of the Interstate Commerce Commission in a way which would make it difficult if not impossible to prevent it, namely, by rendering inferior service and slower service upon joint business to the independent lines and good service in connection with their own lines, so that the independent lines would be compelled to go out of business, as they have been compelled to go out of business under these conditions heretofore existing on the Pacific coast, in San Francisco and in Seattle.

Senator Newlands, Nevada, said (Cong. Rec., No. 399, vol. 48, pt. 11, p. 10572):

> What is the duty of legislators under these conditions? Is it their duty to let this matter rest until time shall demonstrate that the efficiency of the canal has been impaired by the plans of its enemies, or is it their duty, in the exercise of a wise foresight, to provide for the future, and, guided by experience, prevent the practices which have been so injurious and destructive in the past, injurious not only with reference to trans-Isthmian transportation, but which have been injurious upon

> every waterway in the United States, including our coast lines, enabling railroad carriers, through their ownership or control of water lines, which ought to be competitive, to use them as agents for the destruction of their water competitors, recouping any losses which may be suffered temporarily from the railway treasury, and thus having a source of strength in the general revenues of the railway company that a mere water carrier lacks?

IV.

THE VALIDITY OF THE STATUTE.

In the bill of complaint (R. 13) and in the court below, the learned counsel for appellant assailed the constitutionality of the statute. Circuit Judge McPherson said (R. 108, 109):

> In other words, having found that the two carriers actually compete, or may compete, the Commission may nevertheless permit the common control to continue and may allow the land carrier to continue the service by water, if the public interest will be promoted thereby, and if continuance of the common control does not injure the existing, or the potential competition. The plaintiff objects to these provisions on the ground that Congress should have enacted a standard to which the Commission should conform in determining these questions, and contends that no such standard has been ordained and that the whole subject has been turned over to the arbitrary action of the Commission. We do not agree with the argument; in our opinion

> Congress has done all that was reasonably necessary. In the earlier paragraphs of the section, a standard is set up—actual or potential competition—but of necessity Congress was obliged to leave the Commission to decide whether the varying facts of varying situations did or did not conform thereto. The statute declares what rule of decision shall be applied to every case; but, as the precise facts of every situation could not possibly be known, the Commission was of necessity empowered to ascertain them. As already stated, this part of the section is not attacked, and in view of several well-known decisions of the Supreme Court it could not be successfully attacked as unconstitutional. It is no more a delegation of legislative power than is the delegation of power to decide whether a rate is "reasonable" or a practice is "discriminating."

In their main brief in this court they appear to have abandoned that question, as they make no reference to it.

The power of Congress to pass the statute in the form in which it was passed has already been sustained in a case which, at the time, presented constitutional questions of a nature far more serious than any which can possibly arise here. *Intermountain Rate Cases*, 234 U. S. 476.

A comparison of this section of the Panama Canal Act with section 4 of the act to regulate commerce, as amended, demonstrates that the former was modeled after the latter.

That the Congress had the power, had it chosen to exercise it, to enact a law absolutely prohibiting any carrier by railroad engaged in commerce among the several States from owning, or in any manner controlling, any stock whatever of any common carrier by water, wheresoever located, and whether it was in competition with the railroad or not, no one now will deny. *Louisville & Nashville Railroad Co.* v. *Kentucky*, 183 U. S. 503; *Intermountain Rate Cases*, *supra*.

Such a statute might confine the business of rail carriers solely to that of transportation by rail, and if it were in the public interest, and for the public good, the fact that hardships result to parties engaged in perfectly innocent transactions would not destroy the power. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Booth* v. *Illinois*, 184 U. S. 425; *Lemieux* v. *Young, Trustee*, 211 U. S. 489; *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Silz* v. *Hesterberg*, 211 U. S. 31; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Slaughter House Cases*, 16 Wall. 36; *Commonwealth* v. *Gilbert*, 160 Mass. 157.

In order not to disturb the harmless conditions brought about by innocent transactions, the Congress reposed in the Interstate Commerce Commission jurisdiction "to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. * * * In all such cases the order of said Commission shall be final."

The statute in this respect did not change existing law. An array of familiar authorities of this court has already established the finality of the power of the Interstate Commerce Commission to hear and determine questions of fact. The Congress merely enacted into written statute what this court had repeatedly held in opinions. *Illinois Central Railroad Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 465; *Interstate Commerce Commission* v. *Illinois Central Railroad Co.* 215 U. S. 452; *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Co.*, 218 U. S. 88; *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88; *Atkinson, Topeka & Santa Fe Railway Co.* v. *United States*, 231 U. S. 736; *Pre-cooling Case*, 232 U. S. 199; *Los Angeles Switching Case*, 234 U. S. 294; *Pennsylvania Railroad Co.* v. *United States*, 236 U. S. 351; *Louisville & Nashville Railroad Co.* v. *United States*, 238 U. S. 1; *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294; *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U. S. 178.

V.

THE NATURE OF THE ORDER.

The order of the Commission of October 5, 1915, merely denied the application. It can not seriously be contended that the action of the Commission in

denying the application was arbitrary. There is no allegation of fraud, or that the Commission declined to receive and consider evidence. On the contrary, the evidence appears to have been voluminous; the hearing was prolonged, and the arguments were most elaborate. There is not even a suggestion of irregularity on the part of the Commission in conducting the proceedings. On the rehearing "it was conceded by counsel for the railroad company at the argument that no reason had been suggested why the case should be reheard." (37 I. C. C. 38, R. 77.)

The broadside allegation, without any facts to sustain it, that the Commission proceeded arbitrarily and without evidence can not prevail against the reports of the Commission which outlined the evidence and the questions which the company urged for decision in its favor. *Los Angeles Switching Case,* 234 U. S. 311; *Louisville & Nashville Railroad Co.* v. *United States,* 216 Fed. Rep. 672, affirmed, *Louisville & Nashville Railroad Co.* v. *United States,* 238 U. S. 1. On petition and answer, the reports of the Commission are accepted as conclusive. *Interstate Commerce Commission* v. *Illinois Central Railroad Co.,* 215 U. S. 452; *Interstate Commerce Commission* v. *Chicago & Alton Railroad Co.,* 215 U S. 479, 480.

The validity of the statute not being in controversy, the full hearing having been accorded, the findings of fact being conclusive and the only order entered being the order denying the application of the appellant without qualification of any kind, there

would seem to be no question before the court for review. *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282, 292, 293. Circuit Judge McPherson, in dismissing the bill, spoke very clearly and emphatically on this point (R. 104, 105, 106):

> We have serious doubt whether injunction is an appropriate remedy in the present situation. * * * The plaintiff seems to suppose that the Commission has authority to order an offending carrier to divorce itself from the carrier by water; and, indeed it seems to suppose also that the order of May 9, 1915, is at least the equivalent of such a command. We do not so understand the situation. Whatever advice on this subject the Commission may have seen proper to give, either expressly or by implication, what the Commission has actually done is merely to refuse to act; it has declined to suspend the operation of the statute in the plaintiff's favor. No order of divorcement or any other affirmative command has been issued; the order complained of is purely negative, and nothing else is before us. * * * Section 11 of the Canal Act must be left just where Congress chose to leave it, namely, with a declaration of what conduct is to be unlawful after a specified date, and with the sanction of a penalty large enough to make the declaration effective. In substance, Congress has said to an offending carrier: "Here is a rule of conduct for your guidance. If you choose to continue a relation that has thus been declared unlawful, although the Commission does not take any

> direct action to dissolve the connection, we shall make that connection so expensive to maintain that you will be glad to dissolve it of your own motion." And, as the Commission has kept strictly within the power conferred by Congress, and is not threatening to overstep the mark, we are much in doubt whether any ground exists upon which the injunction asked for can be based.

Counsel for appellant argue that the order is subject to review under the authority of *Intermountain Rate Cases*, 234 U. S. 476. (Br. 75.) In that case, on applications of the carriers under section 4, the Commission entered the so-called "zone and percentage order," which was not only an affirmative order, but for bringing about a change in conditions it was probably without a parallel in the annals of commerce. In the instant case Congress has ordered a complete divorcement of the rail lines from the water lines, and the Commission has refused to interfere with the judgment of Congress.

VI.

THE FINDINGS OF THE COMMISSION.

The whole case of appellant appears to rest on certain fragmentary propositions disconnected from each other, each of which has been twice rejected by the Commission and once by the District Court.

First, they say the shippers control the routing of all traffic, and hence the company may not, by routing the traffic, prefer one route over another. (Br. 37.)

When the rates *via* both routes are the same, there is not much choice left to the shipper, hence the finding of the commission, "they (appellant and rail connections) originate the west-bound traffic and control its routing. The actual result of these arrangements is the same as if these petitioners owned the rails reaching these ports." (R. 62.)

Next, they say that "as the two lines are supplemental and the one can not carry anything to the exclusion of the other, there can be no competition between them in rate making." (Br. 57.) And "The Lehigh Valley Railroad Company can not carry a pound of freight to any point its boat line can reach, except the interchange point at Buffalo, neither can it carry a pound of freight over any part of the journey or distance which is now or can be traversed by its boat line." (Br. 67.)

With a keen and far-reaching foresight, the Interstate Commerce Commission observed that if this contention of appellant prevailed, it would virtually amount to a repeal of the Panama Canal Act. Rejecting the contention, the Commission said (R. 62, 63):

> That the existence of paralleling through all-rail routes to which joint through rates are applicable, in which the petitioning railroad participates, is a circumstance bringing any application under this amendment within its provisions, seems clear when the amendment is considered in its application to the railroad ownership of, or interest in, boats operating through the Panama Canal. At the time the

> amendment became a law, nor now, is there any transcontinental rail line owned or operated by a single railroad or system of railroads in the United States. If, therefore, the participation of a petitioning railroad in such through route arrangement does not constitute an arrangement by which it is possible for it to compete with its boats operating through the Panama Canal from and to common points, then this amendment, as applied to traffic through the Panama Canal, is of no effect.

The rule applicable to the Panama Canal is equally applicable here, as it is not to be presumed that Congress prescribed one rule for the canal and another for the Great Lakes.

Again they say, with all the emphasis of italics, that "the Lehigh Valley Railroad Company can not by any possibility perform any transportation service that its boat line might in whole or in part perform." (Br. 67.) The question of the possibility of competition should be considered from the standpoint of what may happen if these two companies are torn asunder. In that event, Lehigh Valley Transportation Company will solicit at Chicago and other points its own traffic, through its own agents, and as the originating carrier it will have a voice in the fixing of its own divisions and in designating who shall be its own connecting rail carriers at Buffalo. In that event, too, Lehigh Valley Railroad Company must also give up a substantial part of the $910,000 which it now boasts represents its annual share of the divi-

sions on the lake and rail traffic, and the transportation company may also be able to reduce its annual operating deficit and show a substantial profit.

If a complete divorcement of Lehigh Valley Transportation Company from Lehigh Valley Railroad Company is accomplished, and other steamship companies are allowed to exist on the Great Lakes in competition with Lehigh Valley Transportation Company and the all-rail lines, all of the steamship companies being able to make their own through routes and joint rates independently of domination resulting from stock ownership or common management, the monopoly of Lehigh Valley Railroad Company will be broken, and the intention of Congress will be subserved. If Lehigh Valley Transportation Company is turned loose to operate for itself, it is not denied that an entirely different status will then exist between the rail line and the boat line, and that the boat line will acquire both traffic and revenue which is now diverted to the all-rail line. Disassociate the two companies and let them separately try out competition as defined by this court—"to compete is to strive for something which another is actively seeking and wishes to gain" (Br. 55)—on the question of the revenues, which is determined by two elements—A, the volume of the traffic; B, the rates and divisions. When the situation presents itself in that light, there will not only be *possibility of competition*, but there will then at once come such a real, active, healthy competition that Lehigh Valley Railroad Company must

yield on the monopoly which it now seeks to hold. The Commission found (33 I. C. C. 715; R. 72):

> * * * Under independent operation each of the lines which is now owned and operated by a railroad, in order to survive, will become a competitor of every other boat line and of every paralleling railroad for all traffic which moves by the Great Lakes or which might move over that route, and the result of such operation will be reflected in the character of service furnished the public and in the rate charged therefor.

VII.

CONCLUSION.

Had the Commission granted the application it would have put its sanction on the very evil which the Congress condemned. The learned circuit judge summarized the whole of the case in a single paragraph to which it is unnecessary to add, viz (R. 109):

> The lawmaking power laid down as definite a rule as it could and merely entrusted the Commission with authority to ascertain the facts. The Commission did not ordain the rule, but merely applies it. Indeed, the plaintiff seems to overlook this aspect of the statute. In sweeping terms *all* forms of joint control are forbidden to the carriers described, but the paragraph now attacked allows the Commission to suspend the prohibition in a certain class of cases. This

is a favor granted to the carriers in exceptional cases, and is not the invasion of a right. If they had a right to be invaded, it was the right of common control; but this (it is conceded) was lawfully taken away and the carrier can hardly criticize the terms on which the sovereign sees fit to restore it as a matter of grace.

The injunction issued at the time the final decree was entered for the purpose of maintaining the existing status pending the disposition of the appeal should be vacated, and the judgment of the district court dismissing the bill of complaint at the cost of the appellant should be affirmed.

JOHN W. DAVIS,
Solicitor General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

MARCH, 1917.

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